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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

12 Cr. 376 (RMB)

5 RUDY KURNIAWAN,

6 Defendant.

7 -----x

8 New York, N.Y.

9 August 7, 2014

9:40 a.m.

10 Before:

11 HON. RICHARD M. BERMAN,

12 District Judge

13
14 APPEARANCES

15 PREET BHARARA

16 United States Attorney for the

17 Southern District of New York

18 STANLEY J. OKULA

19 Assistant United States Attorney

20 JEROME MOONEY

21 VINCENT S. VERDIRAMO

22 Attorneys for Defendant

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(Case called)

THE COURT: We have a few things to go over. You may remember from our last in-court session we put the matter over to today for first a hearing and then for the sentencing itself.

In the interim, the lawyers have been working diligently, one with the other, and it appears that there is no need for a hearing because there is either agreement or agreement to disagree on certain items that I'll need to resolve.

Let's start with this, a brief hearing from the lawyers for both sides. I received a letter dated August 5, 2014 from Mr. Mooney and one of the topics of the hearing that had been scheduled was Mission Fine Wines. I have a question for you when you address this issue. It seems as if the government and the defense agreed on a number of \$2 million.

MR. OKULA: Yes, your Honor.

MR. MOONEY: Yes, your Honor.

THE COURT: And I thought the number was \$2,326,450, from the report in question. So maybe you could address that when you speak.

Then the David Doyle was another sort of big-ticket item. If I understand correctly, the defense agrees that David physically is owed 15.11 million in restitution but that for the loss amount the number is somewhere around 8 million plus.

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1 That's the way I understand it.

2 I'm happy to hear from both the government and
3 Mr. Mooney as to why we don't need the hearing and what's been
4 agreed to and what's still open.

5 In any order you like.

6 MR. OKULA: I'm happy to have Mr. Mooney go first,
7 your Honor, because I think that would establish a certain
8 baseline in terms of what we have agreed to.

9 MR. MOONEY: I think that makes sense, your Honor.

10 First of all, your Honor raised the question of
11 Mission Fine Wines. The report did show \$2.3 million in
12 current value. And we had still some questions with regards to
13 some of the bottles that were included and whether those were
14 properly allocated or should be properly allocated to
15 Mr. Kurniawan.

16 We also had serious questions, and it's similar to
17 what we phrased with Mr. Doyle, with regards to the process of
18 using current values for wines when, in fact, for the purposes
19 of loss calculation it ought to be what was actually paid back
20 at the time, and so that undercuts that.

21 What happened, there was negotiations that we entered
22 into with regards to Mission and our figure was like 1.5
23 million and their figure was someplace between 2 and a half and
24 three million. Ultimately we arrived at a figure of 2 million.
25 And it was my understanding that Mission also agreed to the \$2

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1 million and that's why it's a settlement of the parties for the
2 purposes of both restitution and loss.

3 THE COURT: Mr. Okula.

4 MR. OKULA: It is a settlement for the purpose of
5 restitution and loss in the \$2 million figure, your Honor.

6 THE COURT: I'm happy to adopt that figure then under
7 those circumstances.

8 How about David Doyle?

9 MR. MOONEY: With respect to David Doyle, we have a
10 similar kind of situation, your Honor. And what happens with
11 David Doyle, the first document that we received from Mr. Doyle
12 with respect to the situation was an inventory, Exhibit B,
13 prepared by Susan Twellman that is the 1500 bottles of wine
14 that Ms. Twellman says were purchased from Mr. Kurniawan, that
15 upon his arrest they put together and stuck away in the
16 warehouse, and then they created this list.

17 And, once again, what we have on this list is the
18 current value of those wines. If the wine was what it was
19 supposed to be, they are telling us that the current value of
20 those would be \$17.7 million for those 1500 bottles. That's
21 today's value. As we pointed out in the letter, for the
22 purposes of restitution, your Honor could use current value.

23 We have had some negotiations with Mr. Doyle's
24 lawyers. We have also had discussions with the government with
25 regards to it. Because they have come up with a current

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1 valuation that exceeds the 15.11 million that the government
2 was claiming, we are in agreement that for the purposes of
3 restitution the 15.11 million dollar figure is appropriate and
4 can be used. We still think that some of these things in here
5 are a little high, but we are agreeing to that number primarily
6 because they have a justification that they have put forward
7 that makes sense.

8 THE COURT: Is it also your position that for purposes
9 of loss calculation the number is \$8,862,000?

10 MR. MOONEY: We think that the appropriate number for
11 loss should be half of what the current value is.

12 THE COURT: What's that number?

13 MR. MOONEY: And that number is \$8,840,000, your
14 Honor.

15 THE COURT: \$8,840,000.

16 MR. MOONEY: Correct.

17 We don't have all the data. One of the things, if you
18 recall, one of the things that we were pushing for and that we
19 were unhappy about was that we needed to see what did he pay
20 for the wine. We didn't have that information. That
21 information was then supplied. On Monday we received it from
22 Mr. Doyle's lawyers. It's incomplete. It doesn't have
23 everything. But that's okay. One would not expect necessarily
24 to have everything for purchases from 2005 to 2008. But it
25 gave us a substantial amount of information and it allowed us

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1 to then go through.

2 And to the extent that we could, we went through the
3 list and marked down the differences between what was paid for
4 the wine and what the current values of the wines were. And
5 you get things. For example, a magnum of the 1921 Chateau
6 Chival Blanc is being shown on the inventory, \$20,810.
7 Mr. Doyle purchased it from Mr. Kurniawan for \$10,000. The
8 1947 Chateau Chival Blanc magnum is listed on the inventory at
9 \$22,982. It was purchased for \$12,500. Some of them are
10 dramatically high. Some of them, in all fairness, have stayed
11 about the same and maybe even dropped a little. The 1961
12 Chateau Haut Brion is shown at \$7,049, whereas 6,000 was paid
13 for the same bottles and 800,000 was paid for some others. I
14 can go through more of them.

15 THE COURT: I just wanted to establish that you feel
16 you can go forward without a hearing, which is, I think, what
17 you all indicated to me, based on the record, and you will
18 argue what the record shows.

19 MR. MOONEY: That's correct, your Honor. That's
20 correct. We think that in the record, as we have it now, with
21 the materials that we presently have, there is sufficient
22 information for your Honor to make appropriate findings.

23 THE COURT: You agree with that, Mr. Okula?

24 MR. OKULA: I do.

25 THE COURT: Just one other thing. We are discussing

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1 these figures. The last time we pointed out that the amount of
2 loss is a driver of the sentence that Mr. Kurniawan will
3 receive in the sense that in a fraud case the guideline range,
4 which albeit is no longer mandatory, but is something that we
5 still pay attention to, it's one of the factors that we look
6 at. So the guideline range of incarceration is a function of
7 the total amount of loss, which is why you all and the Court
8 have been spending all this time trying to figure out what the
9 amount of loss is, A, and, B, it makes a pretty big difference
10 if the loss is somewhere between 7 and \$20 million as opposed
11 to being between 20 and \$50 million. Isn't that right?

12 MR. OKULA: Yes, your Honor.

13 THE COURT: We are really arguing about where in those
14 two categories the loss is. And just before we go further, do
15 I understand the defense to be saying that the loss, adding up
16 Fascitelli, Doyle, Devine, Koch, Mission Fine Wines, Spectrum,
17 Andrew Hobson, Reid Buerger, and Acker Merral is 19 million
18 plus? Is that where you are?

19 MR. MOONEY: That's correct, your Honor. We are at
20 19.2 million.

21 THE COURT: You are 800,000 shy of this threshold?

22 MR. MOONEY: That's correct, your Honor.

23 THE COURT: And you, Mr. Okula, are well over the 20
24 million. You're somewhere, in fact, in the 30 million, 35
25 million dollar range, right?

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1 MR. OKULA: I think that's correct, your Honor, yes.

2 MR. MOONEY: I think your Honor mentioned Acker
3 Merral. Acker Merral is not a victim in this.

4 THE COURT: I thought the defense chart showed Acker
5 Merral for \$450,000.

6 MR. MOONEY: No. I think that's somebody else.
7 Excuse me. That's the Acker Merral & Condit auction. That is
8 the 450,000, Truly Hardy's testimony.

9 THE COURT: Did either of you want to say anything
10 preliminary? This is going to take some time because there are
11 lots of details. We have also done a rather close examination,
12 particularly in the area of loss, because there is so much at
13 stake here. And where we could, we did a bottle-by-bottle
14 analysis. It is going to take me a little while to go through
15 all that.

16 What I thought I would do is start the sentencing,
17 there will come a time that I'll ask you again, unless you want
18 to say anything further now, to comment: Defense,
19 Mr. Kurniawan, Mr. Okula. And then there will be another
20 opportunity if you any of the three of you wanted to add
21 anything further.

22 MR. OKULA: I think that would be helpful, your Honor.

23 Might I suggest the following, that your Honor closed
24 essentially the argument with respect to Mr. Fascitelli and
25 Andrew Hobson at the close of the last hearing. Stated another

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1 way, the only thing that we were going to dispute or argue
2 today was really Doyle and Mission Fine Wines.

3 THE COURT: Right.

4 MR. OKULA: I think if your Honor is prepared to
5 announce where you come out on that, based on the current
6 record, it could influence heavily the length of the
7 proceedings because if you find, for instance, that the full
8 amount of the Fascitelli loss is appropriate above 5 million,
9 that's going to put the guidelines loss even for
10 Mr. Kurniawan's position above 20 million, which is going to
11 make academic any further argument on that point.

12 THE COURT: I get that. I am going to do it the long
13 way so we have a record in one place. Admittedly it will take
14 a little bit longer. I am prepared to give you my impression
15 of what the loss is for each of them. And I think, even if
16 it's somewhat repetitious, I am going to do it again.

17 We are here then today for sentencing of Mr. Kurniawan
18 following his convictions on December 18, 2013 of one count of
19 mail fraud and one count of wire fraud. These related to his
20 manufacture and sale of counterfeit high-end wines and also to
21 his obtaining a \$3 million revolving loan from Fine Art
22 Capital, which is a subsidiary of Emigrant Bank. He did that,
23 the latter, by providing false information to the bank,
24 including that he was a permanent resident of the United
25 States, which he is not, and also by pledging assets to secure

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1 that revolving credit loan, and those assets included paintings
2 by prominent artists, including Andy Warhol and Damien Hirst,
3 among others, which he also pledged to other creditors.

4 I thought it would be useful, again, to have in one
5 place, not necessarily required for sentencing, but a brief
6 summary of the principal phases of this case, and they are, as
7 I understand them, the following:

8 First, for the arrest and remand, Mr. Kurniawan was
9 arrested at 9638 East Naomi Avenue in Arcadia, California,
10 where he was living with his mother, on March 8, 2012. Central
11 District of California Magistrate Judge Hillman at the time of
12 his arrest imposed home incarceration with electronic
13 monitoring. There was an appeal by the government of that
14 initial bail package. That appeal was heard by Southern
15 District of New York District Court Judge Denise Cote on March
16 19, 2012, and at that time, incidentally, the defendant and his
17 then attorneys, as well as two Southern District of New York
18 Assistant U.S. Attorneys, appeared from the Central District of
19 California by video conference. That was with Judge Cote, who
20 was here in New York. And Judge Cote denied bail which had
21 been set and ordered a remand of Mr. Kurniawan.

22 No subsequent bail application has been made to me
23 since that time. And on May 23, 2012, I advised
24 Mr. Kurniawan's former counsel, Michael Proctor, of the
25 following. I said to him: I don't actually know what your

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1 position is, Mr. Proctor with respect to bail, if you are
2 seeking a new determination or if you are comfortable with
3 Judge Cote's ruling. That's in the transcript of May 23, 2012
4 where Mr. Proctor responds: We are not seeking a new bail
5 determination today, your Honor. We are still continuing to
6 explore bail resources, and I would not be surprised if there
7 was an application to your Honor at some point in the process.
8 Mr. Kurniawan is a citizen of Indonesia and he has been
9 detained ever since his arrest, which is now over two years
10 ago, and there is a likely immigration hold on him based upon
11 his being a foreign national and also based upon an earlier
12 denial of his application for political asylum in the United
13 States, and an order of his removal from the United States. So
14 that's I'm calling phase 1 or that's one aspect of the case,
15 historically.

16 2 relates to the same date and it relates to this
17 search of Mr. Kurniawan's home pursuant to a search warrant on
18 March 8, 2012 from which search was obtained evidence that was
19 introduced in the trial of this case in December of last year,
20 and that evidence included, without limitation, numerous wine
21 bottle labels, seals, wax, corks, cork remover, cork inserter,
22 laser printer, wine bottles, some of which were full, some of
23 which were empty, some of which were partially full, computers,
24 et cetera. That search was the subject of a defense motion to
25 suppress any evidence seized from Mr. Kurniawan's home on the

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1 grounds principally that the FBI agents involved in the search
2 allegedly conducted an unlawful, what's called protective sweep
3 of Mr. Kurniawan's home. That motion was opposed by the
4 government through a written submission, and at the time
5 neither the defense nor the government requested a hearing on
6 the motion to suppress. Rather, the parties stipulated that an
7 evidentiary hearing was not required. And that motion was the
8 subject of a separate written opinion and order by me dated
9 January 17, 2013. And attached, incidentally, to that order as
10 Exhibit A is a color photo view from the threshold front door
11 of Mr. Kurniawan's home.

12 And in that order I determined, among other things,
13 that the search of Mr. Kurniawan's home was lawful and that
14 there was probable cause for the issuance of a search warrant
15 by United States Magistrate Judge Michael R. Wilner of the
16 Central District of California, a search warrant which he
17 authorized on March 18, 2012, based on several things, one of
18 which was the criminal complaint against Mr. Kurniawan, dated
19 March 5, 2012. That complaint included sworn statements of FBI
20 agents tying the home to alleged criminal conduct. It was also
21 based, the search warrant was, on what we call plain view items
22 observed by law enforcement at the time of Mr. Kurniawan's
23 arrest and which were described to Magistrate Judge Wilner.
24 And it was also based upon the experience of law enforcement
25 officers involved in the case.

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1 I found that there was probable cause to issue the
2 search warrant because, quote, under the totality of
3 circumstances, there was fair probability that contraband or
4 evidence of a crime would be found in the particular location,
5 in this instance Mr. Kurniawan's home.

6 I relied in part for purposes of the probable cause
7 analysis upon the plain view description provided by Agent
8 Farache in his affidavit, dated March 8, 2012, in which he
9 stated, in part, and among other things, from just inside the
10 threshold of the subject Kurniawan's residence front door he
11 observed certain items in plain view. That affidavit was
12 presented to Magistrate Judge Wilner in support of the request
13 for a search warrant.

14 In the probable cause analysis that's set forth in the
15 opinion that I mentioned, dated January 17, 2013, I did not
16 rely on the color photo taken by law enforcement officers at or
17 about the time of Mr. Kurniawan's arrest, which depicted crates
18 and bottles of wine stacked approximately 10 to 15 feet high in
19 plain view of the threshold of Mr. Kurniawan's door because I
20 understood at the time, and have no reason not to have that
21 understanding now, that that photo itself was not presented to
22 Magistrate Judge Wilner. And although the Court did not
23 resolve the separate issue, conclusively, of a good-faith
24 search, it found that it was not necessary to reach the good
25 faith issue definitively because of the probable cause finding

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1 made in that record. But I also determined that law
2 enforcement agents who conducted the search of Mr. Kurniawan's
3 home would have been entitled in good faith to rely on Judge
4 Wilner's search warrant.

5 As you all know, under the good-faith exception, even
6 absent probable cause, evidence will not be suppressed from the
7 officer's reliance on the magistrate's probable cause
8 determination and on the technical sufficiency of the warrant.
9 Here the magistrate issues were objectively reasonable and the
10 magistrate was not misled by statements made with reckless
11 disregard for the truth.

12 I also determined in that order and opinion that the
13 FBI was entitled to rely in good faith upon the search warrant
14 issued by the magistrate and the photo. So the photo I thought
15 and said was relevant to the good-faith issue and that's why it
16 is attached to that opinion and order as Exhibit A. That's the
17 second phase, so-called, or the second highlight of this case.

18 The third is the trial which began on December 9, 2013
19 and ended on December 18, 2013 with the jury verdict of guilty
20 on both counts. There were approximately 16 witnesses,
21 including, among others, Barbara Chu of Emigrant Bank, Truly
22 Hardy of Acker Merral & Condit, FBI Agent James Wynne, French
23 Burgundy vintners Laurent Ponsot so who said, "My idea was to
24 wash the integrity of the terrior of Burgundy. It was starting
25 a crusade against the fakers." That's Mr. Ponsot talking.

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1 During the trial Ponsot stated, among other things, when you
2 are a winemaker, and when you see your bottles faked, the first
3 idea you have is a bit of glory. You say, Wow, somebody is
4 counterfeiting my wines. It means my wines are at a good
5 level. But very quickly I said to myself -- this is Ponsot
6 talking -- yes. But someone one day will open a bottle and
7 will be disappointed because it's not the wine I made. And
8 that is not good for the reputation of the winery. It's
9 dirtying the spirit of the appellations of Burgundy."

10 Christophe Roumier also testified at the trial. He said: "I
11 wasn't sure. I just wrote down in French. But I said the wine
12 was not authentic. This was my last word on it anyway because
13 wine had, if I may say, a taste that is not the touch of
14 tannins that we obtain in Burgundy." And Aubert Gaudin de
15 Villaine also came, as you recall, came and spoke and said the
16 following: Why are fake bottles and counterfeiting a problem
17 for the domaine? It puts a cloud of doubt, you know, on the
18 authenticity of the wines. And then a cloud of doubt is the
19 beginning of less reputation. It's not good for the reputation
20 of Burgundy in general and it can be very destructive. It puts
21 a cloud of doubt on the authenticity of the wines, he said
22 again. When somebody sees a bottle of Romanee-Conti or La
23 Tache or any other wines, it puts a cloud of doubt. It's not
24 good for your reputation.

25 We also heard from William Koch, from David Parker,

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1 from Antonio Beltran Castanos, from Douglas Barzelay, who is a
2 wine collector and who organized a dinner in 2007 to taste the
3 so-called Cellar I and Cellar II auction wines. And he,
4 Mr. Barzelay, said: But the wines were -- there were so many
5 of them that they were so self-evidently fraudulent. And
6 Michael Egan, an expert, reviewed 267 bottles and found them to
7 be all counterfeit. And Brian Kalliel said: I can tell you
8 that he, referring to Mr. Kurniawan, always collected and
9 brought back the bottles.

10 Those are the three phases I wanted to summarize.

11 Turning to sentencing, the rules of sentencing, as you
12 know, have changed rather dramatically over the past six or
13 seven years as a result of Supreme Court decisions in the Gall
14 case, Gall v. United States, in the Kimbrough case, and in U.S.
15 v. Booker, and also decisions from our own Second Circuit Court
16 of Appeals in U.S. v. Crosby and U.S. v. Regalado, among other
17 things. The upshot of these changes is that the United States
18 Sentencing Guidelines are no longer mandatory, as they once
19 were. Now they are a factor to be considered, but by no means
20 the only factor.

21 And now, as a result of these decisions, we, the
22 sentencing courts, are directed to look at a statute that's
23 referred to as 18, United States Code, Section 3553(a), which I
24 have done at least preliminarily over the course of the last
25 several months or so, while this sentencing has been pursued,

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1 written about by the lawyers, the subject of numerous
2 conferences, letters. I have had some opportunity
3 preliminarily to consider these factors which go to the heart
4 of sentencing, and they are as follows:

5 One is the nature and the circumstances of the offense
6 or, in this case, offenses. There are two crimes. Another is
7 the history and characteristics of the defendant. And then we
8 seek to accomplish these objectives in sentencing: 1. Reflect
9 the seriousness of the offense; another, to promote respect for
10 the law; another, to provide a just punishment; another, to
11 afford adequate deterrence to criminal conduct. So I think
12 this sentence hypothetically implicates several of these
13 factors and some of them I have yet to enumerate. I will pause
14 for a moment because I think the issue of deterrence is quite
15 important in this proceeding.

16 We also, as an objective, seek to protect the public
17 from further crimes of the defendant, to provide him as
18 appropriate with needed educational or vocational training,
19 medical care, or other correctional treatment in the most
20 effective manner. And in doing all that we look at the kind of
21 sentences available, the kinds of sentences and the sentencing
22 range established in the sentencing guidelines over which we
23 have spent numerous days pursuing the sentencing guidelines
24 criteria and factors and range, even though, as I said at the
25 outset, the sentencing guidelines are no longer mandatory.

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1 They are just one of several of these factors that we consider.

2 We look at any policy statements issued by the
3 sentencing commission, we seek to avoid unwarranted sentence
4 disparities among similarly-situated defendants, and to provide
5 for restitution.

6 Our practice as sentencing courts is to start with a
7 guidelines analysis, where we have been for the last at least
8 several weeks, perhaps months. And I will spend a fair amount
9 of time yet in this discussion today on the guidelines
10 analysis. I hope you will bear with me. It's a somewhat
11 technical but, I suppose, worse than that, it's lengthy.

12 So the parties in this case, that is to say, the
13 defense and the government, and also the probation department
14 have made separate submissions about the guidelines analysis.
15 And they each, the three of them, I won't say dispute one
16 another, but they have come up with different sentencing
17 guideline ranges. So the defense in this case says that the
18 range of incarceration is between 70 and 87 months under the
19 guidelines and that's based on what we call an offense level of
20 27 and a criminal history category of I. That's the defense
21 position.

22 The government, on the other hand, says that the range
23 is higher and that it's 135 to 168 months of incarceration
24 based on what they believe is appropriate offense level, which
25 is 33, and a criminal history category of I.

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1 The probation department, which is an arm of the
2 Justice Department, they did a calculation and they believe
3 that the guideline range is yet higher still. They believe
4 that the range is 168 to 210 months of incarceration based on
5 an offense level of 35 and a criminal history category of I.

6 Most respectfully I am not going to consider much
7 further the probation department's range. I think that I have
8 discussed this with the lawyers. I think that it's incorrect.
9 I think that in their analysis what the probation department
10 did was to tack on Mr. Kurniawan's second guilty verdict, so to
11 speak, for the Fine Art Capital situation.

12 I added that to the other fraud count and I think that
13 appropriately that was not to happen, that in a case like this
14 the conviction of the counterfeit wine is so much higher, that
15 is to say, the guideline range, than the second count, that the
16 second count is, I won't say disregarded, but is not
17 cumulative. You can all address that if you feel differently
18 when we come to it.

19 The principal difference among these three or a
20 principal difference is, and we have talked about this on July
21 24, is the amount of loss, loss in these circumstances is a
22 term of art and loss is defined as the actual loss and that
23 means the reasonably foreseeable pecuniary harm that resulted
24 from the offense, plus the intended loss, which means the
25 pecuniary harm that was intended to result from the offense and

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1 even, that is to say, the intended loss, even includes the
2 pecuniary harm that would have been impossible or unlikely to
3 occur. An example given is a government sting operation where
4 there really can't be an actual loss, but nevertheless the
5 pecuniary loss intended, even in a sting operation where there
6 will be no actual loss, is included in the definition of loss.

7 And under the guidelines, loss includes the value of
8 all property taken, even though all or part of it may have been
9 returned. That's found in United States v. Brach, 942 F.2d 141
10 a Second Circuit case from 1991.

11 So the big dispute, as I say, is the amount of loss.
12 The defense, Mr. Mooney said a minute ago I think that the loss
13 was 19.2 million, give or take, but not 20 million. And the
14 government says that it's over 20 million, probably closer to
15 30, 35 million. It doesn't matter. The range is 20 to 50
16 million. So anywhere in that range would put you in a
17 different category.

18 In its submission, dated May 1, 2014, the defense
19 requests of the Court a sentence for Mr. Kurniawan of time
20 served. So that means the time that he has already served, the
21 defense is asking that that be his sentence today. And in that
22 submission the defense explains how Mr. Kurniawan became
23 involved in the wine business. It recounts that at age 22, at
24 a birthday celebration for Mr. Kurniawan's father,
25 Mr. Kurniawan ordered a bottle of Opus One. He enjoyed the

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1 taste and learned that he had an unusual ability to discern
2 subtle differences between one wine and another. This is from
3 the defense submission. He began to hone this skill by
4 purchasing wines from a local dealer in the Los Angeles area
5 and then tasting them mostly at home. He would open three or
6 four bottles, take and compare the wines, then return to them a
7 day or two later and see if and how the taste had changed as
8 the wine oxidized. Rudy began buying wines of increasing
9 quality and corresponding price. This is from the defendant
10 submission. Rudy started to attend wine tastings at the Red
11 Carpet, a wine store in the Los Angeles area. The manager of
12 the establishment noticed Rudy and invited him to some other
13 tasting events. Rudy, still in his early twenties, was the
14 youngest person present at these events. Soon the youngster
15 became a prodigy as others began to note the sophistication of
16 his palate.

17 The defense also notes that Mr. Kurniawan will not be
18 eligible for release into a halfway house upon his release from
19 custody as a result of his immigration status. What that means
20 is that where there is, and there probably is in this case, an
21 immigration hold on the defendant, if he were to be released
22 from incarceration or whenever he is released from
23 incarceration, he would not be at liberty, but he would be
24 moved to an immigration facility and his incarceration would
25 continue, particularly where, as here, there has been an order

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1 of deportation.

2 The defense goes on to request from the Court a
3 downward departure. This is the jargon of the sentencing
4 guidelines, the older regime where the guidelines were
5 mandatory, where one could still obtain relief from a
6 guideline, even though it was mandatory, by one of several
7 possible downward departures which the Court could make.

8 And here the defense, although we are not in the
9 guideline regime, has made that application and points out that
10 the guideline in the defense view, the guidelines substantially
11 overstates the seriousness of the offenses of conviction, and
12 in support the defense argues that the relative amount expended
13 by each individual compared to his, each individual's personal
14 wealth, and the relevance objective impact upon him as a result
15 of having purchased fake line causes the valuation based merely
16 on sums spent to be overstated. In other words, the impact on
17 these buyers, many of whom were wealthy, is not as great as the
18 impact might be on someone who didn't have that wealth, and
19 that's one basis the defense is arguing for a lower sentence.

20 The defense is also seeking a lower sentence than the
21 guideline range because of what it calls acceptance of
22 responsibility by Mr. Kurniawan. And the defense in this
23 context says that only by standing trial and allowing the
24 evidence to be presented could Mr. Kurniawan create a record
25 that will allow the Court of Appeals, the Second Circuit Court

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1 of Appeals, to clearly focus on the relative importance of this
2 search, which I mentioned a few minutes ago, as part of the
3 proof presented against him.

4 Defense goes on to say that although Rudy did make the
5 government prove its case, he neither testified nor presented
6 affirmative evidence that he did not engage in the creation of
7 some counterfeit or altered bottles of wine.

8 As part of the defense package there is also a letter
9 from Mr. Kurniawan to the Court dated April 25, 2014.

10 Mr. Kurniawan states, among other things, the following: He
11 says I make no excuses for what I did. What I did was wrong,
12 not only legally, but also morally and socially. He goes on to
13 say: Judge Berman, it is important for me to tell you that I
14 understand what I did was wrong and that I am genuinely sorry
15 for everything that I have done. I never meant for things to
16 turn out as they did. I never meant to hurt or embarrass
17 anyone. I am not evil or violent. And I am truly sorry for
18 the shame and pain that I have brought on my family and the
19 embarrassment I have brought on the people I wanted to be my
20 friends. I am willing to make restitution to the people I took
21 advantage of.

22 I found the letter to be helpful. I found one
23 important point was missing from the letter in that the letter
24 does not take explicit responsibility for the complex
25 multimillion dollar mail and wire frauds found by the jury. So

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1 it doesn't, in fact, say what it is that Mr. Kurniawan did that
2 he is sorry for.

3 By submission dated May 12, 2014, the government seeks
4 a sentence, as I said before, within the range that it
5 calculated, of anywhere from 135 to 168 months. And the
6 government asked the Court to take into consideration that the
7 defendant does not receive any additional points or incremental
8 penalty as a result of the grouping analysis and the crime
9 committed against Fine Art Capital, Count Two. That's a little
10 bit technical, but the point that the government is making
11 there is that when I try to make before and when I said that
12 the probation department's calculation I thought was
13 overstated, because the probation department added Count Two on
14 top of Count One. And under the guidelines the government does
15 not believe, and I agree with the government in this respect,
16 that there should be an additional penalty.

17 So the government's position is, in shorthand, that
18 defendant is essentially benefitting from the fact that there
19 is no incremental penalty for the fraud against Fine Art
20 Capital. I think the government is correct in its analysis.
21 I'm sure the defense also agrees with that.

22 And the government argues further that Mr. Kurniawan's
23 scheme was long lived and caused substantial economic harm.
24 Kurniawan sold millions of dollars of wine that was not
25 genuine. And the government notes that a sentence within the

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1 applicable guideline range, which they feel, again, is 135 to
2 168 months, would help send a message to or deter other wine
3 counterfeiters. The message would be that, quote, cheating
4 others out of their money is a serious crime that will result
5 in substantial jail time. As I said before, I agreed to this
6 extent, and that is that I do feel that deterrence is a key
7 aspect of today's sentencing. I think I might stop here for a
8 little bit of a pause and turn to Mr. Mooney and Mr. Kurniawan,
9 if he wishes to be heard, doesn't have to be and to the
10 government or any aspect of presentation that you wish to make
11 on behalf of your clients.

12 MR. MOONEY: Thank you, your Honor.

13 First of all, I do believe that Mr. Kurniawan does
14 have something that he wants to say to the Court.

15 THE DEFENDANT: Your Honor, I'm really sorry. I meant
16 everything I said in the letter. I thought about a lot of
17 things in the last two and a half years. Now I just want to be
18 able to take care of my mom, who is not in good health. That's
19 all that matters. Thank you, your Honor.

20 THE COURT: Thank you.

21 MR. MOONEY: The Court has been helpful this morning
22 in laying out the foundation and the background of where we
23 find ourselves at this point. This case is unique because
24 there is nothing similar out there. There have been other
25 cases and other things involving people who have counterfeited

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1 wines, who have sold counterfeit wines. Other than the single
2 case in Europe that we made reference to in our pleadings,
3 there have been no other cases. There are some new cases now
4 also in Europe. This is the only one in a United States
5 federal court.

6 It's also a unique case and it's really sort of our
7 key point, because of what ends up being central to this. And
8 it's the concept of bottles of wine that receive such a huge
9 inflated value over what almost any of us can even comprehend
10 that the numbers start to become frightening when we start to
11 look at them and we add them all up.

12 That's why one of our key points with regards to all
13 of this, and I think I really do want to start there and then
14 maybe talk about some of the other technical things. One of
15 our key points is the guided departure that's provided by 20(c)
16 in 1B1.1.

17 One of the things that the commission understood --

18 THE COURT: The sentencing commission.

19 MR. MOONEY: -- sentencing commission understood, when
20 they created and put together the guidelines, was that there
21 were going to be some artificial benchmarks that were going to
22 be created to try to come up with a numerical evaluation of
23 things. One of those was in what we see here with regards to
24 economic crimes. Sort of made sense to say, well, let's look
25 at things in terms of what the values of those things were

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1 because very often value will reflect what the harm is that was
2 done. It's easy to see the sort of measure that it would
3 create.

4 Your Honor is sitting here in this court, in the
5 Southern District of New York, has obviously seen a lot of the
6 cases that have come out some of the financial crimes involving
7 a lot of activities that went on in the mid 2005 to 2010, to
8 some degree ahead, prior to that.

9 Those cases ended up with a substantial amount of harm
10 being done in many cases that could be measured to a great
11 extent by the amount of money that was involved. Because in
12 those cases people's retirement disappeared, charities, which
13 depended upon monies which had been placed in the trust of
14 other people, suddenly found that the money was gone. They
15 could no longer do the things that they had planned to do
16 before. As I said, people were not able to retire. They had
17 to stay at work and continue to try to earn money because the
18 money that they had collected and put together and had spent
19 their life organizing to be able to allow them to live was
20 gone. Companies had to close. People lost their jobs. Havoc
21 was reigned throughout the country on the basis of what
22 happened because the money that was lost in those cases was
23 money that was dearly needed and very important to the people
24 who had put that money up and who had put that money at risk
25 and who had lost that money. The harm in those cases was, to a

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1 great extent, adequately measured by the economic value of what
2 wend forward. This case is different. This case is entirely
3 different.

4 To begin with, it deals with something which was not
5 purchased by people as a necessity. For the most part it
6 wasn't even a real investment. Judge Oetken calls it sort of a
7 hobby and it seems to fall within that category, although there
8 is value and a person who buys one of these models and decides
9 to put it back some place may well be counting on the thing
10 having some value. And, of course, as we see from the listing
11 that we get from Mr. Doyle that seems to have gone up in value,
12 I don't know that that means that it's a place where people
13 ought to go put any sort of investment.

14 And there is absolutely no evidence, no evidence
15 whatsoever that anybody, any individual, any person ever bought
16 these bottles with the idea of them being an investment.

17 And what they paid for them, what they paid for them
18 is absolutely incomprehensible. We provided information that
19 the average price in the United States paid by people for a
20 bottle of wine is \$7. That surprised me. I expected it to be
21 a much higher number. I traditionally spend more than that
22 when I buy wine.

23 And when I saw the figures -- and it comes from the
24 industry. There is a huge difference between \$7 and then --
25 it's absolutely astonishing. One of the wines that Mr. Doyle

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1 has, a 1947 Chateau Chival Blanc, the second Jeroboam,
2 \$231,748. I don't even want to think about what that
3 translates into in price per drink, price per sip. One
4 shouldn't have a thimble full of liquid that is worth more than
5 somebody's paycheck. There shouldn't be a bottle of wine
6 that's three times what people normally make in a year. And so
7 it just completely misrepresents the actual value and the
8 actual harm of what's done. That's the problem with looking at
9 this at a strict number basis and that's why it suddenly shoots
10 it up into the stratosphere. That's why we have suggested to
11 your Honor that the guided departure for overrepresentation of
12 value is appropriate. Nobody died. Nobody lost their savings.
13 Nobody lost their job. Nobody was rendered devoid of things
14 that they needed for their life.

15 Again, I think Judge Oetken says it well. He says the
16 fraud in this case did not result in death, serious physical
17 injury, or even minor physical injury. The fraud did not risk
18 any such jury. The fraud did not result in a restriction of
19 liberty or an insult. In this case he was talking about
20 Mr. Koch's human dignity by way of discrimination. The fraud
21 did not cause an economic loss that interrupted Koch's life by
22 interference with his housing, employment, or saving for
23 retirement, and the fraud did not involve any potential
24 vulnerable victims. And all of the victims are in the same
25 spot as Mr. Kurniawan. They are all the same.

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1 THE COURT: Is the principle that if you are rich and
2 you get your fraud in, the person who commits the fraud pays a
3 lesser penalty?

4 MR. MOONEY: No, your Honor. What I'm saying is that
5 if you defraud somebody who is very rich, even though the
6 number may be bigger, you have to compare that number, using
7 just that number.

8 THE COURT: What do you compare it to, that person's
9 net worth?

10 MR. MOONEY: Perhaps. Or perhaps you look at the
11 impact that it had on it. It would be different, I submit, if
12 as a result of being defrauded, a rich person ends up having to
13 make adjustments to their lifestyle that is impacted in some
14 way. It's the impact that it has upon the person that you have
15 to look at.

16 We gave the example in our papers of the theft of the
17 very expensive car, \$200,000 Rolls-Royce. If you steal that
18 car from somebody who has a garage full of cars, it's a
19 \$200,000 loss, it's an inconvenience, it's an irritation, it's
20 a crime. But you go steal the \$10,000 Ford from the business
21 who relies upon that vehicle for transportation, maybe the
22 crimes are equal --

23 THE COURT: You are saying that the theft of the Ford,
24 that thief goes to jail for a longer period than the thief who
25 steals the Rolls-Royce?

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1 MR. MOONEY: Perhaps. But at least you don't say it's
2 20 times worse for the theft of the Rolls-Royce than it is for
3 the theft of the Ford. In terms of the impact on the victim,
4 they are at most the same. They are at worst the same. It
5 certainly isn't a bigger impact on the person who owned the
6 Rolls-Royce, because the value is greater. Doesn't that impact
7 that person to a greater extent.

8 In terms of the amount that's available, if I went out
9 and I bought a \$150 bottle of wine, and I don't often buy \$150
10 bottles of wine, and it turn out to be a bad bottle,
11 counterfeit bottle, or spoiled or something wrong with it, I am
12 going to be unhappy. I am going to be dissatisfied. But I
13 haven't changed my lifestyle. I haven't been affected on any
14 sort of an important level by that. And my \$150 bottle of wine
15 isn't much different than the 5 or \$10,000 bottle of wine to
16 the buyers in these cases. I think that's why Judge Oetken in
17 the Greenberg case said, you have to look at it in terms of
18 what the impact was on the people that were involved.

19 THE COURT: Judge Oetken, wasn't he in the throes of
20 evaluating the jury's pretty substantial award of punitive
21 damages and he found that to be excessive? While he did award
22 punitive damages, the jury gave some \$365,000 in compensatory
23 damages and then, if I remember correctly, some \$12 million in
24 punitive damages.

25 MR. MOONEY: That's correct, your Honor.

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1 THE COURT: Judge Oetken, what he was doing there, in
2 the civil case, not in the criminal case, was reducing the
3 amount of punitive damages.

4 MR. MOONEY: That's exactly what he was doing.

5 THE COURT: But punitive damages is quite a unique
6 concept. And so some of the things that he said didn't hurt
7 anybody, didn't cause him to change his lifestyle, didn't
8 embarrass him, might be applicable to punitive damages. But
9 you are saying we should apply them in this case to a
10 sentencing. That's the argument you are making, right?

11 MR. MOONEY: I am, your Honor. I think there is
12 relevance, because punitive damages are there for the purposes
13 of punishing egregious behavior. It is interesting that Judge
14 Oetken agreed with the jury's finding with regards to the
15 egregious behavior. He did not say, no, no, no, the behavior
16 was not as egregious in terms of the fraud that was committed.
17 He went through and clicked it off one by one and said, yes,
18 this was egregious, this was very fraudulent. He did it on
19 purpose. There were no mitigating circumstances from the
20 position of what Mr. Greenberg did in Judge Oetken's
21 evaluation. But instead he said, because it is a punishment,
22 you have to look at the harm that was done. And he said that
23 the harm is overstated by the \$12 million and reduced it to
24 700,000. So he reduces it by 15 or so times what it would have
25 been otherwise.

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1 We are saying that that type of analysis is
2 appropriate here. We are all fighting around \$20 million. We
3 are all around that figure in terms of what we are talking
4 about here. If you take that \$20 million figure and you reduce
5 it by 20, you get down something closer to a million dollars,
6 and something in that range makes more sense. We have even in
7 our memorandum suggested that a 100 to 1 would make more sense
8 of production.

9 THE COURT: Ratio of 100 to 1 would make more sense.

10 MR. MOONEY: Would make much more sense in terms of
11 taking it down into a place that more meaningfully represents
12 it. That's really -- and I think I've probably beat that horse
13 to death. That's one of our most important issues with regards
14 to this and I think this case has to be looked at in terms of
15 this focus.

16 It's also important with regards to that to look at --
17 and your Honor says deterrence is important and your Honor
18 talked about the testimony from the winemakers. And their
19 desire, obviously, is to see something happen with regards to
20 this.

21 As your Honor knows, in this area, in white collar
22 cases, very, very long sentences are not necessary for
23 deterrence. In fact, the deterrent effect of a sentence
24 between three years in prison and five years in prison or seven
25 years in prison in a white collar case doesn't seem to change

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1 much. The major thing that happens in white collar cases is
2 the loss of reputation.

3 Mr. Kurniawan has been branded -- unlike many other
4 people that may come into this court, this isn't just something
5 that people can look up and find out about by looking at the
6 court records. His name will always be linked with everything
7 that we see in terms of all of these articles and everything
8 that happened here. He will have no ability to ever escape
9 from what has occurred.

10 THE COURT: That's what we call individual deterrence.
11 But there is also a concept of general deterrence which might
12 deter other people from engaging in that kind of behavior.

13 MR. MOONEY: This is true. But it does have an impact
14 that way. Because what occurs is the information that gets out
15 and the very knowledge that somebody looks at and says, this
16 guy was able to counterfeit all of these wines and create all
17 of this stuff. But look at what happened. He ended up being
18 caught. He ended up being convicted. He ended up spending now
19 29 months locked up and not in an easy place. He has been here
20 in a situation where if he had been convicted and given a
21 three-year or four-year or five-year sentence two years ago, he
22 would have been off in a much more pleasant place, still not a
23 place that any of us, I think, want to sign up to spend time
24 in, but certainly better than where he's been. That's
25 something to take into consideration.

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1 What my point is, in the white collar field it is not
2 the length of sentence as much as the fall from grace and the
3 inevitability of some sentence and some period of incarceration
4 which has the effect.

5 And we cited in our papers another one of the judges
6 in this district who specifically pointed out that that was the
7 case, that in white collar cases lower sentences seem to be
8 fine, but there was certainly no evidence presented that
9 indicated that longer sentences in economic crimes and white
10 collar cases would create a higher deterrent effect.

11 It's pretty easy because the kind of people that
12 engage in these kinds of crimes are people who have been
13 accepted into society. They have been recognized. They have
14 built themselves up to the point that they now have accumulated
15 some status. They don't plan to get caught. That's not what
16 they are thinking about. And for these people to fall from
17 grace and the loss of everything else that they have
18 accumulated is usually much greater in terms of the impact that
19 it has on them than is the dangerous venue spending time in
20 prison.

21 I was talking about the United States v. Adelson case
22 where the Court made reference to the fact that time in prison,
23 incarceration itself, is a smaller deterrent effect. The
24 reasons that we put people in prison, the number one reason we
25 put people in prison is to try to protect society. There is no

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1 evidence that that's necessary with regards to Mr. Kurniawan.

2 We have violent people out there that your Honor sees
3 all the time that we need to keep locked up because these
4 people are dangerous. We put people in prison sometimes
5 because there is things we can do for them. They need drug
6 treatment. They need education. There is things that can be
7 done to help them out. That's not present in this case. All
8 we are talking about here is the deterrent effect that it has
9 for other people who look back at the sentence and the degree
10 of punishment. And I submit to your Honor that in terms of
11 both of those, the objectives are met by the publicity that he
12 has been exposed to, the amount of forfeiture and fines or
13 forfeiture that's been placed against him. There is a \$20
14 million forfeiture order that we have agreed to which
15 liquidates all of his property.

16 THE COURT: That occurred on July 24, where you all
17 signed an order of forfeiture in the amount of \$20 million.

18 MR. MOONEY: That's correct. We all agreed to that.
19 And that is a component of punishment because that's separate
20 and apart from the restitution that he is going to have to make
21 to people, which is another 20 plus million dollars that we
22 have agreed to. There is substantial punishment that's already
23 been in place. He has lost everything; most importantly,
24 business reputation.

25 There is no need for further incarceration in this

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1 case. The best thing for your Honor to do is get him out, let
2 him go on with his life, let him learn from these events, and
3 he has. He is sorry for what he did. He realizes how wrong it
4 was.

5 The interesting thing is, with the ability that he had
6 to create wines that tasted like the great wines, not just
7 phony bottles, but wines that tasted like the great wines, all
8 he had to have done was say, this is a wine that tastes like a
9 1945 DRC, not that it is a 1945 DRC, but it tastes like a 1945
10 DRC, and he would have been fine.

11 It's like the fairly well-known artist in Europe who
12 created all of these paintings that could have passed for
13 masters and, in fact, did pass for masters. We don't know
14 where all of them are at this point. He has learned his
15 lesson. He knows now. He is still creating them. Now he puts
16 his own name on it.

17 THE COURT: There is a question I have not been able
18 to find an answer in all of these submissions, and there have
19 been dozens, from you, from the defense, from the government.
20 We had the trial. I think nobody would dispute that if
21 Mr. Kurniawan had turned his attention to productive or maybe
22 he would have been a wine consultant or an expert or he would
23 have been someone that you might consult before you buy a
24 \$100,000 bottle of wine or any one of the number of things he
25 had so many talents.

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1 Why did he do what he did?

2 MR. MOONEY: He did what he did because it cost him to
3 be accepted and recognized. He was insecure, very insecure
4 because even though his family had wealth, it didn't have the
5 kind of wealth that these other people had. They were a whole
6 different scale. He wasn't as old as they were. They were all
7 older.

8 And when he found some of these early bottles, through
9 those he became accepted by these other people. He wanted to
10 be there. He wanted to be a part of it. So he started to
11 create things.

12 Then he gets hooked up with Acker Merral. And we
13 haven't gone off into a lot of the things that happened there.
14 But they start then feeding it. They start giving him money
15 and saying, okay, we need wines. Go find these wines. We need
16 wines for the auctions. And he can't perform. It's kind of
17 like the athlete who has been hired based upon abilities that
18 he does have, which are good abilities, but his abilities
19 aren't going to be good enough to keep him in the game. So he
20 starts to take drugs so that he can make up the difference.

21 And in Mr. Kurniawan's case he starts to create the
22 wines because he can't find them. He is buying them. He
23 bought \$40 million worth of wine, 40 million. 36 million of
24 that we know was sold as part of what he put back into his
25 sales. But he couldn't keep coming up with these great wines.

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1 They just weren't there. But he could create them and he did.

2 The more he did, the more they gave him money, the
3 more that he had to do more, and it just kept building up and
4 building up. And it made him popular and gave him connections.

5 If you look at the e-mails, suddenly he's on a friend
6 and first-name basis with people like David Doyle, with people
7 like Michael Fascitelli. These are the kind of people that
8 somebody like Rudy could never imagine he is going to be on a
9 friend and first-name basis with as their supplier of this
10 thing that they can't get, because nobody can get it. It isn't
11 there. It's only there because he is creating it. He can
12 become the supplier so he can become the friend. And he gets
13 caught in that emotion of it.

14 The government wants to just make him a greedy person,
15 but the evidence doesn't really support it, because the family
16 had money. He spent \$40 million buying wine. Most of that
17 came from money from the family. A lot of it came from the
18 money of the other sales of things. He could have lived very
19 comfortably and very nice without ever having to have gotten
20 involved in any of this. But he wanted to be over here and
21 recognized with these other people, and he got caught got up in
22 that whole thing. He knows better than that. Besides, he ran
23 forever. That's never going to happen again.

24 What has it done to the overall industry. Your Honor
25 had mentioned the Chateaus. One of the things that's happened

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1 is things are starting to change, things need to change.

2 Because we know, to say that Rudy Kurniawan is responsible for
3 the counterfeits in the market would be absolutely unfair, too.
4 We know that the market is flooded with counterfeits. There is
5 lots of counterfeits, not just the counterfeits that he made.
6 There were counterfeits before he even started ever doing it.

7 Mr. Greenberg's counterfeits didn't come primarily
8 from Rudy. He bought those at Royal. Some of those may have
9 come from Hardy Roedenstock. We know that there is lots of
10 counterfeits. Mr. Ponsot said that 80 percent of what was
11 there in the fine Burgundies were counterfeits. Things have
12 changed.

13 The first thing that's changed is the Chateaus
14 themselves, as a result of that, has started to look at this
15 and said, we need to take some actions in order to provide some
16 better protections. That's one of the things that has happened
17 on a positive note.

18 A second positive thing that has happened is some of
19 the experts, some of the people who have been looking at
20 bottles have studied this. They have used this case as a basis
21 for collecting information, and now being able to do very good
22 evaluations and very meaningful evaluations of bottles that are
23 out there. So there is an opportunity to get a better handle
24 of this. That's what positively changed.

25 What hasn't positively changed. What hasn't

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1 positively changed. Most of the auction houses putting some
2 emphasis on having provenance in terms of the stuff that they
3 sell.

4 THE COURT: They are or they are not?

5 MR. MOONEY: They are not. Instead, they just went to
6 Hong Kong. And the Hong Kong market is flooded with
7 counterfeits.

8 So is there a deterrence from this case? You would
9 think there would be a deterrence. But they don't seem to
10 care. They just moved out of the United States. That's their
11 deterrence. Their deterrence is we will go someplace else
12 because we don't want to be subject of having problems back
13 here.

14 Mr. Koch went around and sued everybody. You would
15 have thought that that would have fixed things. In some cases
16 it had some ameliorative effect. Royal Wine Merchants has now
17 agreed that they are not going to sell high-end wines, so
18 Mr. Koch has had some impact on the market.

19 When it comes to the level of deterrence, I don't see
20 a long sentence for Mr. Kurniawan being something that would
21 deter somebody else from going out and counterfeiting wines.
22 The people that are counterfeiting wines are probably doing it
23 other places at this point. Instead, what has happened, which
24 is similar to deterrence, is that an industry has looked at the
25 practices involved and said, we have to make some changes in

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1 term of how we do things, and that's starting to happen. And
2 we have developed better experts and better tools for experts
3 to be able to do things. There are positives that have come
4 out of this case. It won't end it. It hasn't ended it. But
5 it's unfair to say that this man is responsible. It's just not
6 fair to do that.

7 I think the only guideline issue that we have got in
8 terms -- I sort of moved backwards. The only guideline issue
9 we have really got is whether it's over 20 or under 20, and we
10 think it's just under 20. The government says it's someplace
11 over 20.

12 We think part of the reason that you've got to do that
13 is that you can't assume that every bottle that Mr. Kurniawan
14 sold was a counterfeit because we know \$36 million worth of
15 wine that he sold was wine that he bought. That's part of
16 that. We know that that's in there. The government records
17 show us that 36 million of what was sold was wine that he
18 bought. And so we are assuming that the majority of that is
19 going to be either good or, if it was counterfeit, it wasn't
20 counterfeit that he knew about, counterfeit that he
21 participated anywhere, counterfeit that he had a hand in.

22 We also know that the values should be what people
23 paid, not the present value. Therefore, when you look at the
24 information that was provided by Mr. Doyle, you can't take the
25 15 million or the 17 million because that's a current value,

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1 and the values doesn't match up to what he paid. If you look,
2 what he paid was half or less than that, based upon the records
3 that have been provided to us to take a look at, so that
4 doesn't work. The same thing applies to others.

5 Mr. Fascitelli. Mr. Fascitelli said, well, I paid
6 \$5.5 million to buy wine. We also had the same thing with Mr.
7 Doyle. Part of it was loans. People would make loans. Doyle
8 loaned him a million and a half dollars. Fascitelli loaned him
9 a huge amount of money. Part of it was anticipation that there
10 would be wines in the future that they would receive.

11 Mr. Egan, when he did the evaluation of the Fascitelli
12 wines, the stuff that he evaluated in the one report comes up
13 as 69 percent. That's why we said, okay, that's a figure you
14 can use. In his testimony he talked about \$1.2 million in
15 terms of wines that he had looked at, a good portion of which
16 were Mr. Fascitelli's. One of those figures would certainly
17 make more sense with regards to Mr. Fascitelli. Part of the
18 problem is that those numbers have not been well established
19 for the purposes of loss.

20 The government has talked about people who turned
21 their wines back into Acker. Those people were people that
22 should be included. But that is improper, too. Because there
23 was 100 percent return policy. All that means is that after
24 there was controversy over the wines, people didn't want the
25 product. I may have purchased a General Motors car that has a

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1 faulty ignition switch on it. Then again, it may not have a
2 faulty ignition switch.

3 But when the recall notice comes out, I take it in to
4 have it fixed or repaired, whether it's bad or not. And the
5 fact that I took it back in to be fixed doesn't mean it was
6 faulty.

7 So the fact that people returned their wine without
8 some other evaluation of that wine does not mean that there was
9 a thing wrong with any of those bottles. They well could be
10 part of that \$36 million worth of wine that we know was
11 purchased and sold. All they were doing was using the
12 availability of the return policy to get it back and why not.
13 They spent money on it. There was some question about it.
14 They don't have to go see if there is anything wrong with it.
15 They just return it.

16 It's interesting that we have no idea whatever
17 happened to any of those bottles. Acker didn't report, well,
18 we have all these bottles that we took back from people and we
19 had them all tested, they are all bad. I suspect they were all
20 resold. We don't know where they are. That's what I suspect
21 happened to them. And Acker is not stepping up. Acker has
22 never come forward at all and said, we have got bad bottles.
23 So none of that could be counted for the purposes of loss,
24 because it hasn't been established. It's not enough of a basis
25 there. On that basis we think that the numbers should be under

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1 the 20 million, based what has been established and what we
2 have agreed to in terms of what's appropriate.

3 THE COURT: Not 19.2 million?

4 MR. MOONEY: 19.2. It doesn't make any difference.
5 It could be 19.9 or 2 million and 1. We are saying it should
6 be under the 20 million, not over the 20 million.

7 THE COURT: It's a lot closer to 20 than it is to say
8 10.

9 MR. MOONEY: It is closer to 20 than it is to 10.
10 Unfortunately, we use a cliff system for all of these things.
11 You hit the cliff, you drop over the two extra points. And the
12 two extra points make a difference. The government has the
13 obligation to establish it. And there is doubt here and the
14 benefit of the doubt ought to be given to Mr. Kurniawan to say,
15 okay, it's close to \$20 million, but it hasn't been established
16 to go over the \$20 million. Therefore, we will keep it down
17 there.

18 Unless your Honor has any questions, that's all I've
19 got.

20 THE COURT: Why don't we hear from Mr. Okula and then
21 we will take a little break and we will resume with the
22 sentencing. Is that all right?

23 MR. OKULA: Yes, thank you, your Honor.

24 Your Honor, the presentation that you heard from
25 Mr. Mooney is quite shocking on a number of levels because he

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1 is essentially arguing not only with respect to guidelines
2 calculation but for 3553 factors that there should be two
3 standards that your Honor applies. Your Honor should apply two
4 standards, a different standard for one who carries out an
5 audacious years-long fraud scheme like Mr. Kurniawan did, as
6 the jury found. He should be treated differently and less
7 harshly than people who commit other types of crimes, like
8 violent crimes.

9 That's shocking, your Honor. It's shocking on a
10 number of levels. One, it's not contemplated or even discussed
11 in the guidelines. There is no distinction between someone who
12 victimizes somebody by selling phony Tiffany watches, phony
13 \$5,000 bottles of wine, or the most inexpensive piece of
14 property.

15 Your Honor, fraud is fraud, and the defendant carried
16 out an audacious, multiyear fraud scheme and there is no
17 distinction in a guidelines or logic for treating it
18 differently. Indeed, the guidelines do make an accommodation
19 for the situation that Mr. Mooney is talking about, but in the
20 opposite way that he is arguing. In particular, your Honor,
21 what Mr. Mooney was saying, these are not people who were
22 vulnerable victims. These are not people that when they lost
23 their property they were put on public assistance or the like.

24 There is a specific guidelines adjustment for
25 vulnerable victims. So the guidelines takes that into account,

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1 your Honor, and increases the guidelines when people like that
2 are victimized. It draws no distinction between a person who
3 is making \$20,000 a year, \$50,000 a year, or a person who is a
4 multimillionaire.

5 Let me be perfectly clear, your Honor. We didn't
6 bring this case because we are carrying water for the people
7 who were the principal purchasers of these expensive bottles of
8 wine. We did it for one simple reason, is that the defendant
9 carried out a fraud scheme, and we don't draw distinctions
10 between whether the victims are wealthy or whether the victims
11 are not wealthy. Fraud is fraud. And the defendant happened
12 to run into the perfect storm of having as an investigator the
13 FBI's foremost art and counterfeit expert in terms of Jim
14 Wynne, the special agent who was originally on this case.

15 But for the work of Mr. Wynne and Mr. Hernandez at the
16 outset of this case, the defendant could still be selling the
17 counterfeit bottles. Indeed, and I'll get to this in a few
18 moments when we talk about the intended loss, your Honor saw
19 that tens of thousands of labels that were recovered from his
20 residence.

21 But for him having been found out through the work of
22 Agent Wynne and others and the materials that were recovered in
23 the search, he likely would still be doing what he's doing
24 today.

25 Your Honor, our point is this. There is no

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1 distinction in either the terms of the guidelines or the
2 application notes for giving any adjustment or any downward
3 adjustment based on the loss figures simply because the
4 principal victims here are people who were part of the 1
5 percent.

6 Indeed, your Honor, I think although they are not
7 technically restitution victims in this case, an important 3553
8 factor for your Honor to consider, and one that your Honor
9 alluded to earlier, are the victims like Laurent Ponsot, who
10 testified so eloquently about the harm to his product, his
11 baby, what he spent years cultivating and creating.

12 Once again, they are not strictly restitution victims
13 in this case. But to hear from Laurent Ponsot how there is
14 going to be eternal doubts about whether the bottles that are
15 purchased in the market are good or not good, based on the work
16 of this man, for proliferating the creation of those phony
17 bottles, victims like that, indirect victims to be sure, but
18 victims like Ponsot and the other owners of the domaines that
19 were principally victimized the through the defendant's scheme
20 should be given significant consideration. And, if anything,
21 your Honor, it should be a basis for a higher-end guideline
22 than some sort of reduction.

23 Your Honor, we urge you in the most emphatic way to
24 reject the argument that people should be treated in a
25 different way under the guidelines simply because what number

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1 is reported on their tax return.

2 This is no principal difference, your Honor, for
3 treating a white collar defendant different from an inner city
4 defendant for incapacitation and for general deterrence
5 purposes.

6 Now, I concede readily, your Honor, that the argument
7 for general deterrence is the important one here rather than
8 incapacitation. But you should not buy into the argument that
9 simply because this is a white collar case that the guidelines
10 are relatively irrelevant and you should not figure or consider
11 the loss amount. Your Honor, the defendant knew and understood
12 what the potential scope of his fraud was. In fact, it was his
13 aim not simply to fit in to purchase or to create these bogus
14 bottles because he wanted to be with the crowd, the elite
15 Burgundy tasters at these dinners. He did it for money. He
16 could have fit in with that group by bringing his bottles, his
17 bogus bottles, to the dinners without defrauding all of those
18 people, but he did it for the money.

19 Your Honor, there are some unbelievably devastating
20 and revealing e-mails that speak directly to what the
21 defendant's attempt, what he attempted to do here is. And the
22 one attached to our sentencing memo, which was an April 21
23 e-mail from the defendant to Michael Fascitelli. Your Honor,
24 this e-mail itself is enough to put your Honor over the \$20
25 million mark and, in fact, closer to 50 million.

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1 In that e-mail the defendant, through his conniving,
2 through his misrepresenting, through his luring, really, his
3 lulling of Fascitelli, trying to sell him \$30 million of bogus
4 wines, listen to what he says. He said: This is just my
5 suggestion, which I think is safest and best for you. We can
6 go over the original list. He is referring to an original list
7 of elite wines that defendant had sent to Fascitelli. And this
8 list, when we meet up in New York and I explain to you in
9 detail why this and that, et cetera, Burgundies, I barely
10 tweaked, as it's where the most money can be made quickly for
11 you.

12 So what he is suggesting, and this directly refutes
13 Mr. Mooney's point whether there is any proof whether anybody
14 did this for investment, Mr. Kurniawan is indicating right here
15 that he understood that Fascitelli was holding some of these
16 for possible resale and, in fact, he is suggesting that you can
17 hold them and they will bring money on resale.

18 But he says, I have strong buyers in that category of
19 old stuff in DRC, referring to the names de Villane, Roumier,
20 and Conti. What he's saying is, Mr. Kurniawan is suggesting
21 that Fascitelli buy this 30 million dollar bottle of wine, and
22 then he sold him out in the future saying, I have all these
23 buyers that can circle back and you will make money when you
24 can resell it to them, and he says it in the next paragraph as
25 well. He is trying to lure him in by suggesting he is giving

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1 him a big discount on this \$30 million price. The defendant
2 says, I changed the discount at 35 percent parenthetically.
3 You've got your wish. And came up to 30 million and change.
4 And then he discusses more about how he, Rudy Kurniawan, can
5 bring purchasers of the Fascitelli wine and how the amounts
6 will increase in the future.

7 Why is this important, your Honor? Because it
8 directly refutes a number of things that Mr. Mooney just said
9 to you. One, he tried to do a -- No. He tried to take by
10 fraud \$30 million from Mr. Fascitelli. Two, none of the
11 victims were really doing this for investment. Untrue. Here
12 he is specifically contemplating that Fascitelli is doing it
13 for investment, and he is holding out the potential that he,
14 Rudy, will bring buyers to Fascitelli. So it directly
15 undercuts it.

16 And Mr. Mooney said, well, you know, he had family
17 money. He really did this to fit in. Did he need the
18 Lamborghini just to fit in, Judge. Did he need all the
19 watches, high-end watches that he bought just to fit in. Did
20 he need the two homes to fit in. Did he need to buy interests
21 in these elite Los Angeles restaurants like Comme Ca and Mozza.
22 No. He did it because he wanted to line his own pockets. He
23 did it to line his own pockets. It's the most rudimentary
24 elemental aspect of a fraud scheme. The defendant wanted to
25 take money by fraud and that's what this case is about, Judge.

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1 You should not draw any distinction between the
2 kingpin of counterfeiters, like Rudy Kurniawan, and say that
3 sentencing to jail is unimportant in white collar cases. In
4 fact, it's dramatically important for general deterrence
5 purposes.

6 Your Honor, I spent the last couple of years
7 essentially prosecuting the analogue of Rudy Kurniawan in the
8 tax fraud area, and that defendant was sentenced a couple of
9 weeks ago. He was, by many measures, the most prolific,
10 prodigious purveyor of fraudulent tax shelters responsible for
11 an amount that passed virtually anyone else, \$3 billion of
12 fraud. And there was a 15-year sentence imposed in that case.
13 It was a dramatic reduction of what the guidelines called for.

14 But, your Honor, the sentencing judge in that case
15 recognized that the message had to go out that white collar
16 cases are not victimless cases and in that case the victims
17 were the Federal Government, the treasury, and the state
18 treasuries. Here, the victims of the defendant are the people
19 who bought his fraudulent line and the owners of the domaines,
20 who had their reputation of their wines sullied and forever
21 called into question in the future as a result of his activity.

22 To be sure, your Honor, the numbers are less for
23 specific guidelines, but they call out for, I emphatically urge
24 you, for a guidelines sentence in this case. There are no
25 mitigating factors that suggest that a reduction of the

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1 applicable guidelines is appropriate here. It was in
2 unparallel duration. He did it for years and years and years.
3 When people called him on it, he lied to them, lied to them
4 over and over again.

5 You remember the testimony of Ponsot. How when he
6 tried to confront the defendant, to get to the bottom, where
7 did you get these wines, where did you get these wines, the
8 defendant told him lie after lie, put him off, wouldn't tell
9 him the truth. He had a time then to come clean. He had a
10 time to mend his reputation and to give up the ghost and say,
11 okay, these are all fraud. But he wanted the money. He wanted
12 to keep going. He wanted to continue to sell his fraudulent
13 wines. Your Honor, there are no mitigating factors here.

14 Your Honor, turning quickly to the guidelines issue,
15 as I just alluded to, the Fascitelli e-mail in itself puts your
16 Honor over the \$20 million amount. I don't know how much more
17 your Honor wants to hear, if that's important.

18 But with respect to a couple of other victims,
19 Mr. Mooney referred to Acker Merral and how those returns
20 shouldn't count for intended loss. He disregarded totally
21 Mr. Frischman's evidence with respect to the \$2 million or so
22 of fraudulent wines the defendant consigned to Hart Davis Hart
23 in Chicago that he tried to sell. Those in and of itself put
24 them over the \$2 million amount.

25 Your Honor, as we cited to the cases in the

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1 counterfeiting area, where somebody who possesses additional
2 counterfeit and is caught at that time, the defendant was
3 caught with what could be sold as millions or tens of millions
4 of dollars of additional bottles to prove the fraudulent labels
5 that he had in his residence. That, standing alone, is enough
6 to put you over the \$20 million amount.

7 Your Honor, unless you have specific questions, I
8 would like to conclude. Your Honor, the defendant approached
9 his victims. He promised to his victims that he was selling
10 them. Ron Cruz.

11 At the end of the day, Judge, what this case really
12 came down to was a defendant carrying out a brand con and he
13 should be punished for that. Thank you, your Honor.

14 THE COURT: When you ask for a guidelines sentence,
15 you mean a sentence specifically of what?

16 MR. OKULA: Well, we have a respectful difference of
17 opinion, your Honor, with respect to the application of the
18 more than 10 victims adjustment. I know your Honor's
19 preliminary view on that. I think the cases make clear that
20 even someone who is victimized, someone like Don Stott, someone
21 like Hart Davis Hart determined that they have been defrauded.
22 Even if they don't know the identity of the person who
23 defrauded them, and that's one of the points of points that it
24 made, that they relied on some of the testimony on
25 Mr. Frischman and others saying that they didn't know at that

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1 point in time whether the defendant was the creator of the
2 fraudulent wines or whether he had innocently come into the
3 fraudulent wine.

4 But what is not in dispute, I suggest, your Honor, is
5 that people who receive these bottles knew they had been
6 defrauded because they received counterfeit bottles. And they
7 returned them after they made the determination that they were
8 the victims of the fraud. I think, your Honor, under the
9 guidelines, under the strict reading of that guideline, it does
10 allow your Honor to count those people as victims.

11 Your Honor, in this 3553(a) land that we are now, the
12 two-level adjustment, the difference between level 31 and 33 is
13 not that important. I would suggest, your Honor, that
14 certainly the recommendation of probation, which comes in at
15 the guidelines level, even if you don't count more than 10
16 victims, of 108 to 120 some odd months is the appropriate
17 number in this case.

18 THE COURT: Thanks very much.

19 We are going to take a 10-minute break and there is
20 some painstaking work I still have to do to reconcile these
21 numbers. Let's take a break.

22 (Recess)

23 THE COURT: We need to spend now a little time on
24 this. It is a little painstaking. We need to do this. I have
25 done, with the help of Christine Murray, a detailed analysis of

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1 the record.

2 Incidentally, the record here is voluminous. In my
3 notes, as of July 24, there were submissions dated May 1,
4 written submissions, May 24, July 18 from the defense; and from
5 the government, May 12, May 23, July 16, July 18, July 22, July
6 24, and now August 4. So everything I think that possibly
7 could be said on these issues has been said. And those
8 submissions have all been excellent, by the way, and very
9 helpful.

10 We have been over all of them and where we could we
11 did sort of a bottle-by-bottle analysis. And we do come up
12 with the conclusion that the amount of loss exceeds 20 million.
13 I'll give you the individual sums and you can total them up and
14 you'll see I think it's probably closer to 30 or 30 plus
15 million.

16 So the rule here is that the Court need only make a
17 reasonable estimate of the loss. We have done that. The
18 estimate of the loss shall be based on available information,
19 taking into account as appropriate and practicable under the
20 circumstances. So that is sentencing guidelines 2B1.1,
21 application note 3C. We also looked at United States v.
22 Canova, 412 F.3d 331, a Second Circuit case from 2005, and also
23 United States v. Townsley. The Westlaw cite is 2012 WL
24 3137989. That's from the Northern District of California 2012.

25 And so here are the loss calculations based as much as

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possible on a bottle-by-bottle review.

With regard to Michael Fascitelli, we compute the loss to be \$3,651,800. To get to this sum we reviewed expert reports prepared by Michael Egan. One report, dated August 2008 determined that some 60 percent of the wines were counterfeit. Another report, also in 2008, determined that 75 percent of the wines were counterfeit. We listed the wines determined by Mr. Egan to be counterfeit and then cross-referenced those wines with e-mails that Mr. Kurniawan sent to Michael Fascitelli and those e-mails are dated April 21, 2008 and to David Doyle dated June 12, 2007 in which Mr. Kurniawan offered to sell Fascitelli and Doyle wines for certain specific discounted prices.

So the Court used the value of the wines set forth in Mr. Kurniawan's own e-mails to ascribe a value to each of the counterfeit bottles. I think this is a conservative estimate, so to speak, or conservative calculation, rather, not estimate, which gives the defense the benefit of the doubt.

With regard to David Doyle, we ascribe a loss amount of \$13,611,990. This is based on an affidavit dated July 16, 2004 of Susan Twellman, who is the estate manager for David Doyle, and the government's supplemental submission dated July 18, 2014 of 15.111990 reflects the wire and property transfers made to Kurniawan from Susan Twellman on behalf of David Doyle and that is not disputed. That number is not disputed by the

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1 defense and it's reflected in Susan Twellman's affidavit dated
2 July 16, 2014.

3 The \$15,111,990 amount is further reduced by 1.5
4 million as that amount, as the defense accurately points out,
5 was a cash advance and was not directly connected to any
6 purchase of wine.

7 The Twellman affidavit incidentally contains a 16-page
8 bottle-by-bottle description of 1590 bottles of wine and their
9 current value, if the wine were genuine, that were purchased by
10 Doyle from Mr. Kurniawan, and a separate four-page
11 bottle-by-bottle description of 217 bottles of wine and their
12 current value if the wine were not counterfeit that were
13 purchased by Doyle from Kurniawan through Acker Merral &
14 Condit. A print expert named Barrett Deck, hired by Mr. Doyle,
15 determined that less than approximately 1 percent of the wines
16 were authentic, and thus the loss figure should be
17 approximately \$15 million.

18 The report submitted by Maureen Downey dated August 2,
19 2014 confirms the analysis of the print expert hired by
20 Mr. Doyle in that the sample of 232 bottles of wine of
21 Mr. Doyle's evaluated by Ms. Down were all determined to be
22 counterfeit.

23 By letter dated August 5, 2014, the defense accepts
24 the conclusions reached in the report of Maureen Downey with
25 respect to the David Doyle wines she analyzed, concluding that

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1 each of the approximately 175 bottles of Doyle wines examined
2 in Los Angeles and 24 bottles examined in New York were all
3 counterfeit.

4 Ms. Twellman's affidavit of July 16, 2014 is
5 instructive in another respect. She says that beyond the loss
6 of Mr. Doyle's 19 million dollar investment, Rudy Kurniawan's
7 actions represent utter personal betrayal. Mr. Doyle and I --
8 this is Ms. Twellman talking -- considered Rudy Kurniawan to be
9 a good friend. We spent a great deal of time together and grew
10 to trust him and value his friendship. However, it is now
11 apparent that to Mr. Kurniawan his friendship with us was
12 nothing more than a sham, a means to extract millions of
13 dollars from Mr. Doyle using duplicity and deceit.

14 The result has been -- this is still Ms. Twellman
15 speaking -- the result has been personally devastating to both
16 Mr. Doyle and me. In addition, Mr. Kurniawan's scheme has
17 severely damaged the rare fine wine market and has made the
18 ability to invest in and trade old rare wines extremely
19 difficult, without nearly perfect provenance and documentation,
20 something often impossible to obtain. Authentic wines are now
21 viewed with suspicion and have become severely impaired in the
22 marketplace, making future recovery of investments in these
23 rare wines questionable.

24 Moving along to Brian Devine, I have attributed a loss
25 to him of \$5,320,602.50. Mr. Devine purchased wines from

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1 someone named Leny Tan, which could not be consigned due to
2 authenticity issues. Mr. Devine was advised by Zachy's that
3 they would not offer for sale at any time any wine that he
4 purchased from Leny Tan. It appears to the Court that
5 Mr. Devine did, in fact, purchase wines from Kurniawan as
6 Kurniawan was posing as Leny Tan. I'm referring to an e-mail
7 dated September 20, 2003 from Brian Devine to Leny Tan.

8 The Court has also reviewed an affidavit from Brian
9 Devine, dated June 29, 2014, in which Mr. Devine states, among
10 other things, quote, I never knowingly purchased wine from Rudy
11 Kurniawan. All of my purchases were done through Internet
12 communications with a person named Leny Tan, a/k/a Lenywati
13 Tan, a/k/a Nakasone Tan, which I have since been informed and
14 believe were aliases for Rudy Kurniawan.

15 I originally purchased wine at a WineCommune auction
16 from Lenywati Tan on February 26, 2003 and was thereafter
17 introduced by Leny Tan to Rudy Kurniawan through e-mail.

18 During the period 2003 through 2005, I made numerous
19 purchases of purportedly rare and expensive wine from Leny Tan,
20 who purported to be acting as a broker for various sellers. I
21 paid Leny Tan a total of \$5,320,602.50 corresponding to those
22 purchases. And so I'm finding by a preponderance of the
23 evidence that Brian Devine's loss was \$5,320,602.50.

24 Incidentally, all of these findings are by a
25 preponderance of the evidence, which is the standard at

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1 sentencing time on these issues.

2 So with regard to Andrew Hobson, the Court attributed
3 a loss of \$3,118,856, which is the amount of wines purchased
4 from Kurniawan by Hobson, and expert analysis conducted by Alan
5 Frischman, who determined that the wines were fake. There is a
6 submission dated July 16, 2014 from the government which
7 contains a five-page summary of purchases of wines made and a
8 four-page description of the counterfeit wines purchased.

9 William Koch, \$2,106,486 for loss purposes. You
10 remember that Mr. Koch has, in effect, dropped out of the case
11 in the sense that he reached a civil settlement with
12 Mr. Kurniawan in California in a case that he brought against
13 Mr. Kurniawan there. But still for loss purposes and intended
14 loss purposes I have attributed 2,106,486 to Mr. Koch.

15 Reid Buerger, I have attributed for loss analysis
16 \$192,254. To Spectrum Wine Auction I have attributed \$686,500.
17 And with respect to individuals who purchased from Acker Merral
18 & Condit and who received full refunds for their purchases,
19 this would include: Donald Stott, Edward Milstein, Thomas
20 Roberts, Pia Cattaneo, Gene Mulvihill, Tom Tuft, Robert Cane,
21 Gary Hurvitz, Tom Evans, Jeffrey Levy, Benjamin Lewin, David
22 Solomon. Although I could have used a loss figure and could
23 have used the amount of their refund -- because as is
24 previously noted, the guidelines permit the fair market value
25 of the property unlawfully taken to be used -- I nevertheless

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1 discounted their respective loss amounts to 70 percent,
2 approximating the amount of wines that were counterfeited.
3 That I did based on the testimony largely of Douglas Barzelay
4 by referencing the tasting that he organized with Don Stott
5 from the Cellar I and Cellar II wine sales. We tasted, I
6 think, it ultimately came to 11 or 12 bottles -- this is from
7 Mr. Barzelay speaking -- and six or seven of them were clearly
8 fraudulent. So roughly 70 percent.

9 And as determined by the government expert, Michael
10 Egan, somewhere between 60 and 75 percent of the wine purchased
11 was counterfeit. I'm also relying on United States v. Brach,
12 942 F.2d, 141 Second Circuit case from 1991.

13 Continuing, with respect to Acker Merral & Condit and
14 the April 20, 2008 Cellar III auction, the Court attributed the
15 loss of \$450,000, which we discussed earlier, the value of
16 domaine Ponsot wines removed from auction had that as a low
17 estimate.

18 With regard to Hart Davis Hart Wine Company, I
19 attributed a loss of \$2,613,860, which represent the attempted
20 consignment by Kurniawan to Hart Davis Hart Wine Company in
21 Chicago that was rejected because all or nearly all of the wine
22 was fake. And I relied on the affidavit of Alan Frischman in
23 this regard.

24 With respect to Mission Fine Wines, which we had put
25 over from July 24 for a hearing today, the need for which has

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1 been obviated, because the parties agree that the loss to be
2 attributed to Mission Fine Wines is \$2 million. By letter
3 dated August 5, 2014, the defense states that it accepts the
4 conclusions reached by Downey with respect to the counterfeit
5 wines examined at Mission Fine Wines and that the government
6 and the defendant are in agreement that the appropriate
7 restitution and guidelines figure for Mission Fine Wines is \$2
8 million. Counsel also advised the Court that Mission Fine
9 Wines is in agreement, I think, with this figure.

10 With regard to Christies, I'm not attributing any loss
11 based upon a lack of documentary evidence at this time, and so
12 no loss attributed.

13 Two other issues that we need to resolve, two other
14 legal arguments. As Mr. Okula has pointed out, it makes a
15 difference in the guideline range as to the number of victims
16 involved, victims being a term of art as described in the
17 sentencing guidelines.

18 We have determined, I have, for guidelines analysis
19 purposes that there were less than 10 victims, as defined in
20 the Mandatory Victim Restitution Act, which says that a victim
21 is a person directly and proximately harmed as a result of the
22 commission of an offense. I'm citing United States v. Ekanem,
23 383 F.3d 40, a Second Circuit case from 2004. If you go, as
24 Mr. Okula pointed out, to the application note 1 of sentencing
25 guidelines 2B1.1, it defines victim as any person who sustained

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1 any part of the actual loss permitted under section (b)(1).

2 And the conclusion is that as some of the alleged victims
3 received full refunds from Acker Merral & Condit, I am not
4 including those individuals as victims, pursuant to 2B1.1(b)(2)
5 for purposes of enhancement.

6 Just so you know for the record, I have determined
7 that there are seven victims, and they are Michael Fascitelli,
8 Mission Fine Wines, Reid Buerger, Brian Devine, Andrew Hobson,
9 David Doyle, and William Koch. We do have, the government and
10 myself in this regard, a respectful disagreement.

11 One more issue, legal issue before we turn to the
12 other factors of 18 U.S.C. 3553(a). The question about
13 acceptance of responsibility requested by the defense. That is
14 to say, Mr. Kurniawan's acceptance of responsibility. Even if
15 we were in the guidelines regime, I don't believe that he would
16 qualify here for acceptance of responsibility credit. Let me
17 explain that.

18 United States Sentencing Guidelines 3E1.1, which is
19 called acceptance of responsibility, says, among other things,
20 that if the defendant clearly demonstrates acceptance of
21 responsibility for his offense, decrease the offense level by
22 two levels. It goes on to say in B that if the defendant
23 qualifies for a decrease under subsection A, the one I just
24 read, the offense level determined prior to the operation of
25 subsection A is level 16 or greater. And upon motion of the

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1 government stating that the defendant has assisted authorities
2 in the investigation of a prosecution of his own misconduct by
3 timely notifying authorities of his intention to enter a plea
4 of guilty, thereby permitting the government to avoid
5 preparation for trial and permitting the government and the
6 Court to allocate their resources efficiently, decrease the
7 offense level one additional level.

8 So what does this mean? This means that if there is
9 acceptance of responsibility as defined, you decrease the
10 offense level by two and in some circumstances by one
11 additional level. I don't believe that the arguments for
12 acceptance of responsibility are persuasive here, and I would
13 deny that application. It's clear to the Court that the
14 defendant has not, in fact, either at the trial or even here
15 during the sentencing phase, accepted responsibility for his
16 illegal actions, except through a generalized statement, and I
17 sincerely believe the statement that he is sorry for the
18 position that he has placed himself in. He never specifies the
19 details of what he did that he believes is wrong, legally
20 wrong, with respect to the wine fraud. And with respect to the
21 Fine Art Capital fraud also found by the jury, he makes no
22 effort to justify that in any specificity either.

23 In his sentencing letter to the Court Mr. Kurniawan
24 does not say what exactly he did that was illegal. What is he
25 so sorry about. Which frauds. Mr. Mooney at trial said this.

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1 What do we know. The first thing that we know is that
2 in these wine markets counterfeits are rampant. And to a
3 degree he, referring to Mr. Kurniawan, did commit wine heresy,
4 but not the kind of wine heresy that constitutes a fraud
5 because he wasn't doing it to defraud people. Did he go out
6 there attempting to defraud people? No, he didn't. He went
7 out there wanting to be part of the club, wanting to show off.
8 Did that make him do some things that maybe he shouldn't have
9 done? Perhaps. Probably. He may have gone out there, he may
10 have messed with some of them. He may have recorked and
11 reconditioned. They, the government, haven't proven their case
12 beyond a reasonable doubt.

13 Now, it is perfectly proper for counsel to make
14 whatever arguments he has or at his disposal, so I'm not in any
15 way suggesting that Mr. Mooney has done anything incorrect or
16 wrong. But I think he does point out or it's clear to me that
17 there is no evidence either in Mr. Kurniawan's statement or his
18 letter to the Court or anywhere in the transcript that he takes
19 specific responsibility for the crimes that the jury found that
20 he has committed.

21 We also find in the transcript the following in the
22 sentencing submissions. These are quotations. Rudy learned
23 that everybody expected there to be counterfeits. In fact,
24 part of the contest was to see who could figure out what was
25 real and what was fraudulent. The remedies if you got a bad

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1 bottle were to drink it and point out how it was wrong, or just
2 put it up for auction so that it would pass to the next guy
3 down the line. Trying to keep up with the very wealthy members
4 of the elite wine collector group was expensive, and Rudy
5 started to see himself as part of their world. With the
6 additional money coming in from the advances, he was able to
7 play the part. But in doing so he was spending large sums.
8 The required restaurants, clothing and jewelry were very
9 expensive. The submission goes on to say: Individuals who can
10 afford to pay thousands of dollars for a bottle of wine are
11 members of a sophisticated class and have resources and
12 extraordinary remedies at their fingertips. They have regular
13 lawyers, sometimes phalanxes of them at their call. It is thus
14 clear that the consequences of wronging them are not likely to
15 go unpunished. They can and will take care of themselves.

16 To the high-end wine market, primarily represented by
17 a small group of collectors and the auction houses that cater
18 to them, seems to recognize, even accept that fraudulent wine
19 is part of its culture. This is in the defense submission. It
20 is of note that in spite of years of controversy, open general
21 acknowledgement of the phenomena and many thousands of blog
22 entries discussing what is real and what is not, the market has
23 shown no inclination to correct itself. And then, finally,
24 from the defense, it seems clear no matter how counterintuitive
25 it may be, that no sentence that this Court imposes will have

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1 any impact on this trade, the market, or its participants.
2 Only the buyers and sellers themselves can meaningfully affect
3 this practice and protect themselves, and they can do it
4 easily.

5 I am not so sure that those statements, me personally,
6 I don't accept those statements as true. I do think that the
7 Court can certainly, in part, impact fraudulent behavior, deter
8 it to some extent in the course of today's sentencing. These
9 arguments are unconvincing to me.

10 I note again that Mr. Kurniawan did not even address
11 how he allegedly accepted responsibility for the fraud
12 committed against Fine Art Capital except to note that Fine Art
13 Capital was fully repaid, principal and interest, on its loan,
14 and all costs incurred from the sale of the security pledged
15 for the loan. I don't think that this is legally sufficient.

16 In the Court's view, the defendant has not clearly
17 accepted responsibility for his actions, although surely he
18 regrets the position he is now in. Although the defendant may
19 not have testified at trial -- incidentally, I find no fault in
20 the fact that defendant went to trial. He has every right to
21 do that, as every defendant does, because every defendant is
22 presumed to be innocent unless and until the jury determines
23 otherwise or there is a guilty plea. I'm not in the least bit
24 faulting his exercise of his right to have a trial.

25 Although he did not testify at the trial and he had no

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1 obligation to do that either, an affirmative defense was
2 presented. Expert, Mr. C. Robert Collins testified, among
3 other things, on behalf of the defense, that authentic wine can
4 end up with many different labels. And when asked by defense
5 counsel, and has that made it more difficult to identify the
6 authenticity of many Burgundies, Mr. Collins replied,
7 absolutely.

8 I think that disposes of the legal issues. Forfeiture
9 has been done by consent. Number of victims I just indicated.
10 Loss amount I just indicated. Restitution will we will come to
11 later, but I don't think there is any difference or much
12 difference at all between the defense and the government with
13 respect to restitution.

14 Let's move to the 18 U.S.C. 3553(a) factors and see if
15 we can make some sense of this story here. If you analyze
16 those factors, this is what stands out, at least to me.

17 As to the nature and circumstances of the offense, I
18 think this was a very serious economic fraud or con -- that
19 word has been used, I think it applies -- a very serious crime
20 and a manipulation of the U.S. and international marketplace
21 for the buying and selling of fine wine. It's not so much with
22 respect to or is in addition with respect to any individuals
23 who may have been harmed, but great harm, I think, by these
24 behaviors pose a threat to the U.S. and international
25 marketplace, not only for buying and selling fine wine, but for

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1 other products as well.

2 Mr. Kurniawan burst on the Los Angeles scene in or
3 about 2001 in his early twenties, presumably from a wealthy
4 Indonesian family, and bedazzled the high-end U.S. wine market,
5 no doubt, including many who perhaps should have known much
6 better, with his expert palate, expensive clothes and cars and
7 watches, his spectacular and seemingly generous tastings and
8 buying dinners for which he invariably picked up the tab. His
9 financial assets at one point were estimated to be in and
10 around \$41 million, including world class art and a voracious
11 appetite for buying and selling fine wine.

12 But at the heart of this crime, the con I would say,
13 Mr. Kurniawan cleverly over time included wine manufactured in
14 his Los Angeles kitchen and repackaged in empty famous vintage
15 bottles which he had sent to his home in and among the likely
16 genuine bottles of wine that he also sold, until rumors of
17 counterfeiting overtook him and these rumors became criminal
18 reality.

19 As to the history and characteristics of the
20 defendant, we don't know much, but we have learned, it appears
21 he comes from a wealthy Indonesian family of Chinese descent.
22 Wealth is stated in the presentence investigation report to be
23 in the field of real estate. He is educated and has lived in
24 the United States since he has been 16 years of age, as far as
25 I can tell. He has two brothers who were interviewed in

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1 connection with the presentence investigation report, I think
2 at my suggestion that there be family members interviewed. And
3 they seem to think that this is just business and don't seem
4 really to get the seriousness of Rudy's criminal convictions.
5 His mother lives in Los Angeles, supported by the two brothers.

6 That's as much really as we know, as I know about
7 Mr. Kurniawan's background.

8 The need for the sentence imposed to reflect the
9 seriousness of the offense, to promote respect for the law, to
10 provide just punishment, the Court finds, as noted, that
11 Mr. Kurniawan's frauds are very serious because the amounts of
12 money, the amount of loss is somewhere between 20 and \$50
13 million.

14 But perhaps even more important, because of the
15 negative light they cast upon the marketplace and the good
16 names of some of our leading institutions, not just in France,
17 but here as well, some of our global trading partners,
18 particularly in Burgundy, France, who, among others, helped
19 burst the wine fraud Kurniawan bubble and crucially came to New
20 York City to testify in the Kurniawan trial.

21 With respect to deterrence, here we speak both of
22 specific and general deterrence and both are enormously
23 important in this sentencing, perhaps general deterrence being
24 more important. First, as to Mr. Kurniawan, that would be
25 specific deterrence. We know what I've said about him

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1 historically. But we don't know really what motivated this
2 bold, grandiose, unscrupulous, but destined to fail con. We
3 need a sentence that removes him from the marketplace to deter
4 his further criminality.

5 Second, and, as I say, perhaps even more important
6 than others, we need to make clear to other would-be
7 counterfeiters or people who would defraud that they will
8 receive significant punishment in the form of jail time if they
9 attempt to manipulate our commerce and our trade relationships
10 by committing fraud.

11 And then as to the factor of protecting the public
12 from further crimes, many of the people who were directly
13 impacted by Mr. Kurniawan's frauds are wealthy, and no doubt
14 about that, and can take care of themselves pretty much as has
15 been shown. We all recognize that.

16 But the public at large needs to know that our food
17 and our drink are safe and are what's on the label and not some
18 homemade and potentially unsafe witch's brew. And the public
19 needs to know that our economic dealings are on the up and up
20 and that our criminal justice system will do its part to help
21 stamp out fraud.

22 There is another factor, providing the defendant with
23 needed educational or vocational training or medical care or
24 other correctional treatment, that does not seem to be a
25 significant factor in this case.

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1 We look at the kind of sentences available, the kinds
2 of sentence and sentencing range established in the sentencing
3 guidelines, which, fundamentally, by my calculations, are 108
4 to 135 months of incarceration. We are looking at any policy
5 statements issued by the sentencing commission, seek to avoid
6 unwarranted sentencing disparity among similarity-situated
7 defendants, and to provide for restitution.

8 As I've just mentioned, the applicable sentencing
9 guideline range in this case is 108 to 135 months of
10 incarceration. I computed the offense level to be 31 and the
11 criminal history category to be I. I'm somewhat lower than the
12 government, higher than the defendant, lower still than the
13 probation department.

14 When you consider all of these 18 U.S.C. 3553(a)
15 factors, here is what conclusions I drew. Mr. Kurniawan is 37
16 years old. He resides in the U.S., without permission, after
17 having been denied asylum in March 2001. He was ordered to
18 self deport. He appealed that decision. The appeal was
19 dismissed on or about March 25, 2003. And he was, again,
20 ordered to deport within 30 days. He has a college education,
21 appears to have been in the United States since the age of 16.
22 He is a citizen of Indonesia and is in the U.S. illegally
23 following the denial of his asylum petition. He is single, has
24 no children. He appears to be from a wealthy Indonesian family
25 of Chinese descent. He was raised in Indonesia by his parents

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1 and at the age of 16 entered the U.S., from my understanding,
2 legally, with a student visa. He lived for a time with two of
3 his brothers in California. They now, as I understand it,
4 live, one in Jakarta and the other in Hong Kong.

5 When the defendant was in his early twenties his
6 mother entered the United States and the defendant thereafter
7 resided with her in California where she, having been granted
8 asylum, still lives. Defendant appears to have been an
9 important caregiver for his mother, who is now approximately 66
10 years of age, and they speak by phone regularly. It appears
11 that defendant's employment was exclusively related to the
12 purchase and sale of wine. As I indicated before, both
13 defendant's mother and two brothers were interviewed by the
14 probation department.

15 Victims. I have noted before that I believe that
16 there are seven, less than ten, that is. That impacts the
17 offense level. I've taken that into account in arriving at an
18 offense level of 31. I have looked at United States Sentencing
19 Guidelines 2B1.1 and application note 1 and also United States
20 v. Abiodun, 356 F.3d 162, a Second Circuit case from 2008.

21 Restitution. Restitution is owed to those individuals
22 with identifiable actual losses. This is somewhat different
23 and the restitution amount can and in this case is different
24 than the loss amount. Because loss amounts include actual and
25 intended loss, there are individuals or entities who have loss

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1 amounts that are higher than their restitution amounts.
2 Restitution awarded by the Court is also reduced by any
3 reimbursement already received by the victims. The restitution
4 is payable to the clerk of court for disbursement to the
5 following victims.

6 Before I get to those names, I want to use a moment to
7 give you some more citations with respect to restitution. One
8 is United States v. Maurer, 226 F.3d 150, Second Circuit case
9 from 2000. Another is United States v. Schwamborn, 542, Fed
10 Appx 87, a Second Circuit case from 2013. It's a summary
11 order.

12 The persons to whom restitution is owed are the
13 following: Formerly we had included Mr. Koch on the list. But
14 as you know, by letter dated July 24, 2014, counsel for
15 Mr. Koch said that he is withdrawing his claim for restitution
16 in this case.

17 Michael Fascitelli, \$3,651,800, determined from expert
18 reports of Mr. Fascitelli's wines and valuation provided by
19 Mr. Kurniawan. By letter dated July 18, 2014, the defense has
20 said the following: Mr. Fascitelli's claim for restitution
21 should be reduced to 69 percent of the figure that he paid, 5.5
22 million, so that number came to 3,795,000. My figure is
23 somewhat lower than that figure. This figure includes allowing
24 the 69 percent even relating to wines for which he paid but
25 never received. At the hearing argument on July 24, 2014,

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1 defense counsel said it was our understanding that 5.5 million
2 represents what Mr. Fascitelli bought all together. So the 69
3 percent is what we see when we look at these reports and, quite
4 frankly, it's a fair figure to apply. We think it's an
5 appropriate figure to apply, and we think it gives a fair
6 number to Mr. Fascitelli. The defense number, as I say, is a
7 little bit higher than the number I have come up with, and that
8 number is \$3,651,800.

9 The number for Reid Buerger for restitution is
10 \$192,254. That reflects the amount purchased from Acker Merral
11 & Condit at the October 2006 auction that Mr. Buerger attempted
12 to sell at another auction who questioned the authenticity of
13 the wines. I think defense counsel agrees with this figure.

14 The number that I have come up with for David Doyle,
15 restitution is \$15,111,000. I've used a figure that defense
16 counsel has used, also. That is \$15,111,000.

17 Brian Devine, restitution, \$5,320,602.50. According
18 to his affidavit, dated June 29, 2014, during the period 2003
19 to 2005, Mr. Devine made numerous purchases purportedly of rare
20 and expensive wine from Leny Tan. These are the Leny Tan wines
21 that I described before.

22 Andrew Hobson, \$3,118,856 restitution.

23 Jeffrey Levy listed by probation as a victim entitled
24 to restitution. I don't think that is accurate and so I have
25 not set a restitution amount for Mr. Levy.

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1 Mission Fine Wines, there is agreement, as we have
2 heard before, among the parties and also with the consent of
3 Mission Fine Wines, that \$2 million is the appropriate
4 restitution amount.

5 I think if you add these figures up, it will come to
6 or pretty close to \$29,395,502.50. I'm sorry. That minimum
7 should be \$28,405,502.50. I took off the \$990,000 to make my
8 figures compatible with the defense figures. So the number is
9 somewhat lower.

10 Forfeiture. Forfeiture is mandatory, even when
11 restitution is also imposed. So there is forfeiture and
12 restitution, not one or the other. These two aspects of a
13 defendant's sentence serve distinct purposes. Restitution
14 functions to compensate the victim whereas forfeiture acts to
15 punish the wrongdoer. The two remedies need not be at cross
16 purposes. Although it is not bound to do so, the government
17 has the discretion to use forfeited assets to restore a victim
18 whom the defendant has failed to compensate. The cite is
19 United States v. Blackman, 746 F.3d 137, a Fourth Circuit case
20 from 2014.

21 As you have heard at the July 24, 2014 proceeding in
22 this matter, the parties agreed to a forfeiture of \$20 million,
23 and I signed an order to that effect. I have also reviewed the
24 presentence investigation report in this case which was
25 approved on July 7, 2014, together with an addendum of that

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1 date, and there was a second addendum approved on that date,
2 and a sentencing recommendation also of July 7, 2014.

3 Some but not all of the written submissions that I
4 have received are dated July 18, 2014; May 24, 2014; May 1,
5 2014 from Mr. Mooney and Mr. Verdiramo; from the government
6 dated July 18, 2014; July 16, 2014; May 23, 2014; and May 12,
7 2014. That was as of the July proceeding. There have been
8 numerous additional submissions since then. There are also
9 submissions dated April 25, 2014. May 23, 2014 is the letter
10 from Mr. Koch. There is also a letter submitted to probation
11 from Williams and Connelly dated June 18, 2014 on behalf of
12 Reid Buerger.

13 So I would ask you, Mr. Mooney, if you and
14 Mr. Kurniawan have had the opportunity to read and discuss the
15 presentence investigation report as well as the addendum and
16 sentencing recommendation and additional sentencing materials?

17 MR. MOONEY: Yes, your Honor, we have.

18 THE COURT: Mr. Kurniawan, you discussed those
19 materials with your attorney?

20 THE DEFENDANT: Yes, your Honor.

21 THE COURT: Do either of you have any remaining
22 objections to the contents of the presentence report?

23 MR. MOONEY: No, your Honor. I think the Court has
24 corrected those problems.

25 THE COURT: Mr. Kurniawan, any? No.

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1 How about the government?

2 MR. OKULA: No, your Honor.

3 THE COURT: I will return the presentence report to
4 probation, which is our usual practice.

5 And at this time, if you wish, Mr. Mooney,
6 Mr. Kurniawan, and Mr. Okula can have another opportunity to
7 address the Court, if you would like to. You can also
8 incorporate what you've said before, if you would prefer.

9 Mr. Mooney, anything further?

10 MR. MOONEY: Yes, your Honor.

11 I understand your Honor's concern with respect to the
12 potential impact of this case on international markets. I
13 think it overstates to a certain extent the nature of that
14 because this only deals with the very highest-priced portions
15 of it and, in fact, doesn't deal with anything that is in
16 direct market from any of the vineyards. It deals --

17 THE COURT: I am not sure I understand that.

18 MR. MOONEY: In other words, no product at these
19 prices is being sold out of the vineyards. This is stuff
20 that's been bottled. It's been sold. It's old.

21 THE COURT: Secondary market.

22 MR. MOONEY: Or tertiary or who knows how many times
23 down there. Because what makes them valuable is, it's material
24 that's still around after a really, really long time. It's
25 like when I go into an old bookstore. I've got an early

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1 edition of the writings of juveniles. My purchase or
2 nonpurchase of that doesn't have any impact on the writer
3 because he's been dead for a really long time. In fact, in the
4 cases of many of these wines, one of the difficulties was that
5 the winemakers have even been dead for a period of time. I
6 think that's something to take into consideration when looking
7 at it in terms of the markets. It did not directly impact the
8 relationships of the markets.

9 THE COURT: We had three very much alive winemakers
10 here in court testifying, and they are very much alive.

11 MR. MOONEY: They are very much alive and they came
12 here and they testified. And they testified that this is a
13 problem. And as we said before, one of the positives that came
14 out of this case is the focus that it put on this and the fact
15 that some practices are changing. Mr. Ponsot himself is the
16 one that said, well, I first heard that people were
17 counterfeiting some of my wines. And he first heard about it
18 in the Hong Kong market, not something that was done to
19 Mr. Kurniawan, but in the Hong Kong market, and said, I was
20 flattered at first. And then later I decided, no, this is
21 potentially a problem because people might taste it and it
22 wasn't what it was supposed to be.

23 What happens is, the winemakers, the Chateaus, are
24 taking additional efforts now to make sure that wines are going
25 to be registered, that the bottles are going to be marked on

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1 the high end. We will have a better system to be able to look
2 at. If you go back and look at the letter from Devine, when he
3 was sent the Mission wines to look at, several of which he
4 actually authenticated, he said in there, one of the problems
5 with early wines is that different printing was used, different
6 labels were used. Nobody cared very much about those things.
7 Now they care. Now they are taking efforts. There have been
8 changes that are made that are actually positive changes.

9 That's not to say that punishment isn't appropriate
10 and some deterrence isn't appropriate. I just think it's
11 important to note that perhaps some good in some ways is coming
12 out of this, although from everything else that I'm hearing, it
13 doesn't seem to have changed anything that's going on in Hong
14 Kong, although interestingly, as we pointed out, the Susan
15 Twellman affidavit, which has the inventory, and she says in
16 her affidavit on the one hand, well, the market has been
17 affected. But then on the other side you look at the current
18 values of these wines.

19 What Mr. Doyle is holding, according to what
20 Mr. Doyle's people are telling us now, would have been worth
21 twice the amount that he paid for it. So the market doesn't
22 seem to have been deflated by virtue of this, because the
23 prices are up. The bottom certainly hasn't dropped out. There
24 have not been any economic injuries that have occurred as a
25 result of those things. That's, I think, our position. There

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1 is something that we think is important with regards to those
2 aspects.

3 The Court has come up with a guideline, lower
4 guideline level of 108 months. That's nine years. That's a
5 long time. That's a very, very long time under these
6 circumstances. It's particularly long due to the fact that
7 because of his immigration status, he would have to serve out a
8 full 85 percent of that time. He wouldn't have any other
9 options. And then he would be held -- when all of that was
10 done, he served 85 percent of the guidelines sentence and then
11 at the end of that period of time he would go over to the heads
12 of the immigration, and who knows they would hold him before
13 they finally would dispose of what they are doing. That in and
14 of itself is something the Court could take into consideration.
15 He would be entitled to up to 10 percent of that for halfway
16 house release. Almost one year of a sentence would be time
17 that a person who was in the country legally or citizen would
18 potentially not have to face. He is not going to get any of
19 those benefits.

20 Also because of his immigration status he is going to
21 have some difficulties in placement. He would still qualify
22 for a low-level facility, but he wouldn't be able to
23 participate in any off-facility jobs, employment, or work like
24 that. His immigration status will make him have to stay in the
25 facility. That will make the service of time more difficult,

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1 more complicated, and certainly not as commodious as somebody
2 who does not have that impediment. Those are factors. His
3 status, I think, are factors that I think the Court should take
4 into consideration under 3553(a) in terms of imposing a
5 sentence which is below the guideline parameter.

6 Further, as we have said before, even though the Court
7 has determined that this is a serious financial fraud, and we
8 don't argue with that, it's still important to note that the
9 relative harm that was done to the various victims -- again, I
10 know I spent an awful lot of time talking about this. But the
11 relative harm that I think would justify this Court in saying,
12 I am going to come down a little bit, because people were not
13 individually devastated. And there really wasn't the capacity,
14 even, for people to be individually devastated. Did it have an
15 impact on all sorts of things that are going on? Yes, it did.
16 Some of those are potentially good, some of those perhaps not
17 so good.

18 As I said before, there is no bodies. Nobody died.
19 Nobody was seriously injured. Nobody suffered any kind of
20 physical injury whatsoever from this. Is it important for us
21 to know what's in the bottles that we are getting? It is.
22 There has never been any indication that Mr. Kurniawan put
23 anything in these bottles other than wines which he had blended
24 to taste like the great wines.

25 It's very interesting that Mr. Doyle drank a 1945 DRC,

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1 one of the number one wines that everybody has pointed to that
2 said, those were Rudy Kurniawan counterfeits, those were
3 counterfeits, he drank one of those bottles with a number of
4 other people, and they talked about it as being extraordinary.
5 There was even a newspaper article that was written on how
6 great this wine was that he drank. He was very careful about
7 what he put in the bottles, very careful about what he put in
8 the bottles. We are not having a situation where things were
9 put into the bottles that could be harmful to people. There is
10 no indication that anything happened that had any threat of
11 harm whatsoever. We do agree that that's important, but it's
12 important here that he was careful about what he put in.

13 And I think it's important that what he put in the
14 bottles, he tried to put things in that would match the taste.
15 He didn't just have the bottle with the label that he had put
16 on it and people opened it up and it's just horrible. For the
17 most part when people drank it, they thought it was the right
18 thing.

19 We have another situation, another 1945 DRC. This is
20 the one that was opened, everybody signed it, they drank it at
21 the party here in New York. Mr. Devine came over himself and
22 drank it. Everybody thought it was great. We don't know. Was
23 that one that was real or was it one that Mr. Kurniawan made.
24 For the most part, one of the reasons this went on for a fair
25 amount of period of time was the stuff that he made tasted

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1 right. People still got the experience. They did get the
2 experience. It was different than just saying, okay, I'm going
3 to phony up the label and then I am going to put stuff in it
4 that's going to be awful when people drink it. That didn't
5 happen. I think that's a factor that can be considered.

6 Look at the bottles. Look at the evidence from trial
7 about what he was buying to put in. He was spending 2 or \$300
8 a bottle for the wines that he was getting, that he was mixing
9 together to put into the bottles. He wasn't putting in the \$7
10 wine that is the average wine that we hear about from people.
11 It's a very expensive wine. It wasn't what people were buying.
12 No, it wasn't. We never maintained that it was. It was not.
13 It was absolutely not what they were buying. They paying for
14 something else. What they got was a replica. It wasn't a bad
15 replica, but it was a replica that certainly wasn't worth it.
16 They should not have been selling it for \$10,000, or \$5,000, or
17 \$4,000. He should have been selling it for \$300 to \$400. He
18 didn't do that. He committed a crime. He committed fraud.
19 Nine years is just way too long for that. Just way too long
20 for that, your Honor. A substantially shorter sentence would
21 still send all the messages that the Court wants and would be
22 an appropriate disposition in this case.

23 THE COURT: Mr. Kurniawan, did you want to add
24 anything?

25 THE DEFENDANT: No. I'm just really sorry.

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1 THE COURT: Mr. Okula.

2 MR. OKULA: Your Honor, we have gone on at some
3 length. I just want to make two quick points and I'll be very
4 brief, your Honor.

5 To the extent that Mr. Mooney is arguing that the
6 defendant's fraud, inasmuch as it has caused a change in
7 practices by the wine industry that he should be given some
8 credit for that, the Court should reject that. The fact that
9 the bank may put up safety screens after they have been robbed
10 by a bank robber doesn't mean that the bank robber deserves
11 credit because they have caused a bank to be more careful. So,
12 too, here in the fraud, your Honor. Maybe we should have taken
13 a lot of steps earlier to try to put in anticounterfeit
14 devices. But the fact that the defendant's fraud caused him to
15 do that doesn't mean that he deserves credit.

16 The second point, very briefly, your Honor, is one to
17 pick up on something that you observed earlier. That is, that
18 no one really knows what's in those bottles. The defendant
19 doesn't certainly have the safety precautions in place in his
20 kitchen to make sure that something isn't going to go awry with
21 what he's putting in the bottles. As Mr. Mooney just conceded,
22 what he was selling, what he was doing in lying to people was
23 giving them something that was grossly inferior.

24 Your Honor referred earlier to the jargon of the
25 sentencing guidelines. Using the jargon of the wine industry,

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1 your Honor, what the defendant was doing was engaging in the
2 prolific prevail of plonk. It's a reference to inferior,
3 grossly inferior wine and that's what he was doing. He was
4 lying to people, taking their money and giving them plonk. For
5 that he deserves, based on his serious offense, a serious
6 sentence.

7 THE COURT: I am going to adopt the findings of fact
8 in the presentence report unless defense counsel has any
9 further objections.

10 MR. MOONEY: No.

11 THE COURT: Mr. Kurniawan, any further objections?
12 No. How about the government?

13 MR. OKULA: No, your Honor.

14 THE COURT: I am going to state the sentence I intend
15 to impose and then I am going to impose it.

16 The guideline range, as I've calculated it, is 108 to
17 135 months. The offense level is 31. The criminal history
18 category is I. I intend to impose a sentence of 120 months of
19 incarceration. I intend, also, to impose a term of supervised
20 release following incarceration of three years, subject to what
21 are called the mandatory conditions which are that defendant
22 not commit another federal, state, or local crime; two, that he
23 not illegally possess a controlled substance; three, that he
24 not possess a firearm, dangerous weapon or destructive device;
25 and, four, that he refrain from any unlawful use of a

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1 controlled substance. That he be required to submit to one
2 drug test within 15 days of placement on supervised release and
3 at least two unscheduled drug tests thereafter as may be
4 directed by the probation officer.

5 In addition, he will be required to comply with what
6 are called standard conditions 1 through 13, plus these: He
7 shall be supervised in his district of residence. That assumes
8 that there is no deportation. To the extent that assumes that
9 in the event he were released for some reason in the United
10 States, he would be subject to supervision in his district of
11 residence. And in that case he would be required to report to
12 probation within 48 hours of release from custody. He is
13 required, also, to cooperate with the Department of Homeland
14 Security, Bureau of Citizenship and Immigration Services in
15 connection with any proceedings they may bring to determine his
16 status in the United States. And he will be required to abide
17 by their rules, regulations, and laws. In addition, he is
18 required to file all past tax returns, if that has not
19 occurred, and pay all past due taxes, if there are any.

20 With respect to fine, I'm not imposing a fine. The
21 financial penalties here are very steep and no fine is needed
22 in addition.

23 I am imposing restitution, as I said before, in the
24 amount of \$28,405,502.50, payable to the clerk of court for the
25 benefit of the individuals that I identified who are entitled

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1 to restitution.

2 How this is to be paid during the term of
3 incarceration if the defendant is engaged in a BOP non-UNICOR
4 work program, the defendant shall pay \$25 per quarter toward
5 these criminal financial penalties. However, if he
6 participates in a Bureau of Prisons' UNICOR program as a grade
7 1 through 4, to be required to pay 50 percent of his monthly
8 UNICOR earnings toward the criminal financial penalties
9 consistent with BOP regulations at 28 CFR 545.11. If any
10 portion of the financial penalties remains unpaid at the time
11 of Mr. Kurniawan's release from incarceration, the remainder
12 shall be paid during the term of supervision in equal monthly
13 installments.

14 We have also considered forfeiture, and I have signed
15 an order of \$20 million forfeiture agreed to by the parties.

16 Going back for a moment to the payment schedule, I
17 have considered the factors set forth at 18 United States Code
18 Section 3663(a)(1)(B)(i) and 18, United States Code, Section
19 3664 in imposing restitution. Among other things, I have
20 considered the amount of the loss sustained by victims as a
21 result of the offense, the financial resources of the
22 defendant, the financial needs and earning ability of the
23 defendant, and any dependents he may have and such other
24 factors as I've deemed appropriate. In addition, I intend to
25 impose a \$200 special assessment which is mandatory under 18

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1 United States Code, Section 3013.

2 Briefly, the reasons for the sentence. First of all,
3 the offense level is 31. The criminal history category is I.
4 The guideline range is 108 to 135. I do believe that this
5 sentence is appropriate in light of the factors which we have
6 been analyzing most of this morning at 18, United States Code,
7 Section 3553(a). And I think that this sentence meets those
8 criteria and objectives, considering the nature and
9 circumstances of the offenses to be very serious, the history
10 and characteristics of Mr. Kurniawan. I think this sentence
11 reflects the seriousness of the offense, promotes respect for
12 the law, provides a just punishment, affords adequate
13 deterrence, both individual and general deterrence to criminal
14 conduct, protects the public from further crimes.

15 And so before I actually impose that sentence, I will
16 give defense counsel, Mr. Kurniawan, and the government one
17 more opportunity to comment.

18 MR. OKULA: We have nothing further, your Honor.

19 MR. MOONEY: Your Honor, I will just say again I think
20 for Mr. Kurniawan and for what he did and what he's involved
21 in, I think that this is harsh. I would ask the Court to
22 reconsider at least going to the lower level of the guideline,
23 which would be 108 months. That's a substantial sentence.
24 It's a guidelines sentence. It doesn't even move outside.
25 It's a difference of only one year. But it's a significant

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1 difference in terms of the potential impact upon Mr. Kurniawan.
2 Again, in recognition of the fact that because of his status,
3 there is so many benefits that he just won't have.

4 THE COURT: Mr. Kurniawan, anything further?

5 THE DEFENDANT: No.

6 THE COURT: I would ask you to please stand and I
7 intend to impose the sentence.

8 So the guideline range, which is not mandatory, as we
9 have said many times today, is 108 to 135 months. Having
10 considered the factors at 18 United States Code Section
11 3553(a), it is my judgment that the defendant, Rudy Kurniawan,
12 be committed to the custody of the Bureau of Prisons to be
13 imprisoned for a term of 120 months, followed by three years of
14 supervision subject to the mandatory and special conditions
15 that I mentioned before and incorporate here by reference. No
16 fine.

17 Restitution in the total amount of \$28,405,502.50 to
18 the individuals identified previously and incorporated here by
19 reference. Payments to be made through the clerk of court.
20 Forfeiture in the amount of \$20 million has already been agreed
21 to. I also impose a \$200 special assessment which is due
22 immediately and is mandatory.

23 And, again, I believe that this sentence comports with
24 the criteria and factors at 18 U.S.C. Section 3553(a), as I've
25 discussed and we have been discussing for a good part of today.

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1 And so I think this is the appropriate sentence.

2 Does either counsel, starting with the government,
3 know of any legal reason why this sentence should not be
4 imposed as so stated?

5 MR. OKULA: We do not, your Honor.

6 MR. MOONEY: No, your Honor.

7 THE COURT: I hereby order the sentence to be imposed
8 as so stated.

9 Mr. Kurniawan, you have the right to appeal this
10 sentence. If you are unable to pay the cost of an appeal, you
11 have the right to apply for leave to appeal in forma pauperis.
12 If you request, the clerk of court will prepare and file a
13 notice of appeal on your behalf immediately.

14 Do you understand your appeal rights?

15 THE DEFENDANT: Yes, your Honor.

16 THE COURT: Any open counts or aspects of the case the
17 government was seeking to resolve?

18 MR. OKULA: No, your Honor.

19 THE COURT: Starting with the government, did you wish
20 to add anything to today's sentencing proceeding?

21 MR. OKULA: We do not, your Honor.

22 THE COURT: How about the defense.

23 MR. MOONEY: Your Honor, we would ask the Court to
24 recommend a designation to a facility in southern California,
25 specifically the Taft facility, which is near Bakersfield and

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1 is the closest facility to where Mr. Kurniawan's mother lives.

2 THE COURT: Is it T-a-f-t?

3 MR. MOONEY: Yes, your Honor.

4 THE COURT: I will make that recommendation. It's in
5 or near Bakersfield?

6 MR. MOONEY: It's just outside of Bakersfield. It's
7 in Taft, California, which is close by there.

8 THE COURT: Mr. Okula, is there not an underlying
9 indictment here that we need to resolve?

10 MR. OKULA: I don't believe so, your Honor.

11 THE COURT: To the extent that there were, you would
12 ask me to dismiss it.

13 MR. OKULA: Most respectfully, yes, your Honor.

14 THE COURT: I think then I will make that
15 recommendation, counsel.

16 And I think that concludes our long work this morning.
17 And I wish you, Mr. Kurniawan, the very best of luck going
18 forward. Thanks very much.

19 o0o